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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.*.), the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*), the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), the Grain Standards Act (7 U.S.C. § 1821 *et seq.*), the Horse Protection Act (15 U.S.C. § 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. § 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930, (7 U.S.C. § 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. § 151 *et seq.*).

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

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In re: MERLIN W. FRERKING.
A.Q. Docket No. 91.
Dismissal filed June 2, 1988.

Cynthia Koch, for Complainant.
Ruth Graham, for Respondent.
Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge.

DISMISSAL OF COMPLAINT

Upon the motion of complainant, the complaint herein is hereby dismissed.

In re: D. L. McKIEVER.
A.Q. Docket No. 116.
Dismissal filed June 2, 1988.

Cynthia Koch, for Complainant.
Herman Hamilton, Jr., for Respondent.
Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge

DISMISSAL OF COMPLAINT

Upon the motion of complainant, the complaint herein is hereby dismissed.

In re: ROGER NORRED.
A.Q. Docket No. 227.
Dismissal filed June 1, 1988.

Joseph Pembroke, for Complainant.
Respondent, pro se.
Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge.

DISMISSAL OF COMPLAINT

Upon the motion of complainant, the complaint herein is hereby dismissed.

In re: ARMANDO ORTIZ-ROMERO.
A.Q. Docket No. 319.
Dismissal filed June 30, 1988.

Patrice Harps, for Complainant.
Respondent, pro se.
Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge.

DISMISSAL OF COMPLAINT

Upon motion of complainant, the request that the complaint in this proceeding be dismissed without prejudice is granted.

In re: MIKE ROSE, RANDY WILSON and DON ROSE.
A.Q. Docket No. 88-1.
Decision and Order filed March 31, 1988.

Interstate movement of cattle without permits, owner's statements, and certificates - Failure to file answer.

William Jenson, for Complainant.
Respondent, pro se
Decision and Order issued by Edward H McGrail, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondents violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and the regulations promulgated thereunder. Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by mail, upon the respondents.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) the respondents were informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegations in the complaint would constitute an admission of such allegation pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)). The respondents were also informed that the failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

The respondents filed no answer or any other document during the twenty-day period provided. Their failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)). Their failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Since the respondents are deemed to have admitted the material allegations of the fact in the complaint as they apply to them, they are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Mike Rose, respondent, is an individual whose mailing address is Route 1, Willard, Missouri 65781.

2. Randy Wilson, respondent, is an individual whose mailing address is Route 1, Brighton, Missouri.

3. Don Rose, respondent, is an individual whose mailing address is Route 1, Willard, Missouri 65781.

4. On or about December 29, 1983, respondent Mike Rose moved one cow interstate from the National Livestock Commission Company, Springfield, Missouri, to the American Packing Company, Durant, Oklahoma, in violation of sections 78.5 and 78.7(b) of the regulations (9 C.F.R. § 78.5 and § 78.7(b)), because the one cow which was a brucellosis reactor was moved interstate

without being accompanied by a permit, as required.

5. On or about August 10, 1984, respondent Mike Rose moved at least eight (8) cows interstate from the Stock Yard Beef Sale, Tupelo, Mississippi, to the Ozark Packing Company, Pleasant Hope, Missouri, in violation of section 71.18 of the regulations (9 C.F.R. § 71.18) in that the cows, which were two years of age or over, were not accompanied by an owner's statement or other document containing prescribed information, as required.

6. On or about August 10, 1984, respondent Mike Rose moved at least four (4) cows interstate from the Stock Yard Beef Sale, Tupelo, Mississippi, to the Ozark Packing Company, Pleasant Hope, Missouri, in violation of sections 78.5 and 78.7(b) of the regulations (9 C.F.R. § 78.5 and § 78.7(b)), because the four cows which were brucellosis reactors were moved interstate without being accompanied by a permit, as required.

7. On or about April 13, 1985, respondent Mike Rose moved three cows interstate from the Athens Livestock Commission Company, Athens, Texas, to the National Stockyards, Springfield, Missouri, in violation of section 71.18 of the regulations (9 C.F.R. § 71.18), in that the cows, which were two years of age or over, were not accompanied by an owner's statement or other document containing prescribed information, as required.

8. On or about April 13, 1985, respondent Mike Rose moved three cows interstate from the Athens Livestock Commission Company, Athens, Texas to the National Stockyards, Springfield, Missouri, in violation of sections 78.5 and 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.5 and § 78.9(d)(3)(iii)) in that the cows, which were two years of age or over, were not accompanied interstate by a certificate, as required.

9. On or about April 13, 1985, respondent Mike Rose moved three cows interstate from the Athens Livestock Commission Company, Athens, Texas, to the National Stockyards, Springfield, Missouri, in violation of sections 78.5 and 78.9(d)(3)(iii)) in that the cows which were two years of age or over, were not accompanied by a "Permit for Entry."

10. On or about April 25, 1985, respondent Mike Rose moved approximately five cows interstate from the Sulphur Springs Sale Barn, Sulphur Springs, Texas, to the farm of Mike Rose, Willard, Missouri, in violation of section 71.18 of the regulations (9 C.F.R. § 71.18), in that said cows, which were two years of age or over, were not accompanied by an owner's statement or other document containing prescribed information, as required.

11. On or about April 25, 1985, respondent Mike Rose moved approximately five cows interstate from the Sulphur Springs Sale Barn, Sulphur Springs, Texas, to the farm of Mike Rose, Willard, Missouri, in violation of sections 78.5 and 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.5 and § 78.9(d)(3)(iii)) in that the cows, which were two years of age or over, were not accompanied by a certificate, as required.

12. On or about August 22, 1985, respondents Randy Wilson and Mike Rose moved one cow interstate from the Sulphur Springs Dairy Auction, Inc., Sulphur Springs, Texas, to R&R Dairy, Willard, Missouri, in violation of sections 78.5 and 78.9(d)(3)(iii)) in that the [illegible]

or over, was not accompanied by a "Permit for Entry".

13. On or about August 22, 1985, respondents Mike Rose and Randy Wilson moved one cow interstate from the Sulphur Springs Dairy Auction Sulphur Springs, Texas to R & R Dairy, Willard, Missouri, in violation of sections 78.5 and 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.5 and § 78.9(d)(3)(iii)) in that said cow, which was two years of age or over, was not accompanied interstate by a certificate, as required.

14. On or about July 26, 1984, respondents Mike Rose and Don Rose moved three cows interstate from the Stock Yard Beef Sale, Tupelo Mississippi, to their farm in Willard, Missouri, in violation of sections 78.5 and 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.5 and § 78.9(d)(3)(iii)) in that the cows, which were two years of age or over, were not accompanied interstate by a "Permit for Entry".

15. On or about July 26, 1984, respondents Mike Rose and Don Rose moved three cows interstate from the Stock Yard Beef Sale, Tupelo, Mississippi, to their farm in Willard, Missouri, in violation of sections 78.5 and 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.5 and § 78.9(d)(iii)) in that the cows, which were two years of age or over, were not accompanied by a certificate, as required.

16 On or about July 26, 1984, respondents Mike Rose and Don Rose moved one cow interstate from the Stock Yard Beef Sale, Tupelo, Mississippi, to their farm in Willard, Missouri, in violation of sections 78.5 and 78.9(d)(3)(iv) of the regulations (9 C.F.R. § 78.5 and § 78.9(d)(3)(iv)) in that the cow, which was two years of age or over, was not accompanied by a "Permit for Entry."

17. On or about July 26, 1984, respondents Mike Rose and Don Rose moved one cow interstate from the Stock Yard Beef Sale, Tupelo, Mississippi, to their farm at Route 1, Willard, Missouri, in violation of sections 78.5 and 78.9(d)(3)(iv) of the regulations (9 C.F.R. § 78.5 and § 78.9(d)(3)(iv)), in that the cow, which was two years of age or over, was not accompanied by a certificate, as required.

Conclusion

The respondents have failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondents in the complaint and in the letter of service that accompanied it. By their silence, respondents have admitted all of the material allegations of fact in the complaint as they apply to them and have waived a hearing.

By reason of the Findings of Fact set forth above, the respondents have violated the Act and regulations promulgated thereunder. The following Order is therefore, issued.

Order

Respondent Mike Rose is assessed a civil penalty of seven thousand dollars ($500 per violation); respondent Randy Wilson is assessed a civil penalty of one thousand dollars ($500 per violation); and respondent Don Rose is assessed a civil penalty of two thousand dollars ($500 per violation); which shall be payable to the "Treasurer of the United States," by certified check or money order and which shall be forwarded to the U.S. Department of

Agriculture, Animal and Plant Health Inspection Service, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondents, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

In re: JAMES W. HICKEY, d/b/a S&S FARMS, and S.S. FARMS, INC.
AWA Docket No. 369.
Order filed June 27, 1988.

John Griffith, for Complainant.
Roger Reid, Albany, Oregon, for Respondent.
Order issued by Donald A Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent's request for reconsideration is denied for the reasons set fort in the original decision filed herein.

In re: ROBERT E. and MARGENE MEEVES.
AWA Docket No. 194.
Order filed June 13, 1988.

Robert Ertman, for Complainant
Daniel Williamson, Ida Grove, Iowa, for Respondent
Order issued by Victor W. Palmer, Chief Administrative Law Judge

Order

Complainant has moved that this case be dismissed, stating that the respondents are no longer operating as dealers under the Animal Welfare Act and that further formal proceedings are not necessary to effectuate the purposes of the Act

Accordingly, for good cause shown, the complaint in this matter shall be and hereby is dismissed, without prejudice.

In re: APEX MEAT and PROVISION, INC.
FMIA Docket No. 104.
Order filed June 28, 1988.

Joseph Pembroke, for Complainant.
Philip Olsson, Washington, D.C, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Order

The application for Federal Meat Inspection which is the subject of this proceeding, having been withdrawn without prejudice by respondent, and the complainant and respondent having filed a joint motion to end this proceeding, this proceeding is hereby ended without prejudice.

So ordered.

In re: W.W. BENNETT HURT.
P&S Docket No. D-88-38.
Decision and Order filed May 16, 1988.

Failure to maintain adequate bond coverage - Failure to file answer.

Thomas C. Heinz, for Complainant.
R. Keith Neeley, Christiansburg, Virginia, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 202.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) W.W. Bennett Hurt, hereinafter referred to as the respondent, is an individual whose business mailing address is P.O. Box 351, Blacksburg, Virginia 24060.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail received September 24, 1987, that the $15,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act and the regulations was inadequate and that it was necessary to increase such bond to $35,000.00 before continuing his livestock operations subject to the Act. Respondent was further advised that if he continued his livestock operations under the Act without providing

adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account and the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. § § 201.29, 201.30).

Order

Respondent W.W. Bennett Hurt, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. § § 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and Order became final June 28, 1988.-Editor.]

In re: JAMES E. OLESEN.
P&S Docket No. 6909.
Decision and Order filed April 14, 1988.

Failure to maintain adequate bond coverage - Failure to file answer.

Ben Bruner, for Complainant.
Respondent, pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and

Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) James E. Olesen, hereinafter referred to as the respondent, is an individual whose business mailing address is 726 Montgomery Court, Sioux Falls, South Dakota 57103.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy livestock in commerce for purposes of slaughter as the employee of Packerland Packing Company, Inc.

(c) On January 2, 1987, Packerland Packing Company, Inc., notified the Packers and Stockyards Administration that James E. Olesen was no longer their employee.

2. Respondent was notified by certified mail received January 10, 1987, that it was necessary for him to register with the Secretary of Agriculture in an individual capacity and to furnish an adequate bond or its equivalent. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. § § 201.29, 201.30).

Order

Respondent James E. Olesen, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers

and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final June 13, 1988.-Editor]

In re: PENNSYLVANIA COOPERATIVE SHEEP & WOOL GROWERS ASSOCIATION.
P&S Docket No. 6877.
Order filed June 17, 1988.

Jory Hochberg, for Complainant.
Respondent, pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

ORDER OF DISMISSAL

On the basis of complainant's Motion to Dismiss, the complaint in this proceeding is hereby dismissed with prejudice.

In re: FRANCIS G. SEGA.
P&S Docket No. 6922.
Decision and Order filed April 22, 1988.

Failure to maintain adequate bond coverage - Failure to file answer.

Sharlene W. Lassiter, for Complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Ac 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referr to as the Act, instituted by a complaint filed by the Administrator, Packers

Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 202.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Francis G. Sega, hereinafter referred to as the respondent, is an individual whose business mailing address is R.D. 1, Richmondville, New York 12149.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy livestock in commerce for his own account.

2. Respondent was notified by certified mail dated October 8, 1986, that the $10,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act would terminate on December 6, 1986. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201 29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account and the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201 30 of the regulations (9 C.F.R. § § 201.29, 201.30).

Order

Respondent Francis G. Sega, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without

filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. § § 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final June 2, 1988.-Editor]

In re: SPENCER LIVESTOCK COMMISSION CO., and MIKE DONALDSON.
P&S Docket No. 6254.
Order filed June 13, 1988.

Jory Hochberg, for Complainant.
Dean J. Miller, Caldwell, Idaho, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER LIFTING STAY

Judicial review having been completed, my order of April 29, 1987, staying imposition of the suspension and civil penalty provisions of my order dated March 19, 1987, is hereby lifted. The suspension shall commence and the civil penalty shall be due and payable six days after service of the order on the respondents.

In re: UNITY LIVESTOCK, INC., SANDRA R. BANDY, and WARREN "BUTCH" BANDY, JR.
P&S Docket No. 6856.
Supplemental Order filed June 27, 1988.

Roberta Swartzendruber, for Complainant.
Bernard Fineman, East Liverpool, Ohio, for Respondent.
Supplemental Order issued by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On December 9, 1987, an order was issued in the above-captioned matt which, *inter alia,* suspended respondents as registrants under the Act for period of five years, provided, however, that upon application to the Packe and Stockyards Administration, a supplemental order shall be issued modifyin this order to permit respondent Sandra R. Bandy's or Warren "Butch" Bandy's salaried employ[illegible]

Respondent Warren "Butch" Bandy has filed an application for the modification of the suspension provision referred to above to permit his salaried employment by Indiana Farmers Livestock Market, Homer City Pennsylvania. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued December 9, 1987, is modified to permit the salaried employment of respondent Warren "Butch" Bandy by Indiana Farmers Livestock Market. The order shall remain in full force and effect in all other respects.

In re: WESTERN STATES CATTLE COMPANY, TOM M. CROWL, GARY D. DeHAAN, and MERRITT BROWN.
P&S Docket No. 6592.
Decision and Order filed June 23, 1988.

Order buyer - Failure to pass on shrink allowance - Failure to maintain proper records - Invoices based upon falsely increased prices and weights

The Judicial Officer affirmed Judge Palmer's order requiring respondents jointly or severally (except Brown), to cease and desist from: engaging in a course of business of obtaining money by false or deceptive pretenses in connection with livestock purchases or sales, entering into agreements with any other person for the same purpose; misrepresenting to principals, or any others, the true nature of purchase prices or weights, or buying service charges; preparing and issuing false livestock marketing documents and accounts, inserting or omitting information in records causing a false record of livestock transactions; collecting payment, or aiding others to collect, from purchasers of livestock on the basis of false accounts; and misrepresenting to buyers the terms and conditions of sale. Additionally, respondent Brown was ordered to cease and desist from misrepresenting livestock sales terms and conditions; while the other respondents were ordered to keep and maintain true and accurate accounts under the Act. The ALJ had suspended the corporate respondent as a registrant under the Act, and prohibited the other respondents from operating subject to the Act, for a period of 6 months. The Judicial Officer extended the 6-month suspension order to include both the corporate respondent and its two alter egos (Crowl and DeHaan), while continuing in effect the 6-month prohibition against all of the individual respondents from operating subject to the Act for 6 months. Respondents violated the Act when they increased weights and prices when buying livestock on commission for principals, and by increasing the weight in one dealer transaction. The proof surpasses the preponderance of the evidence, which is all that is required. ALJ's findings of fact are given great weight by the Judicial Officer, but may be reversed. Individual respondents who are the alter egos of a registered corporation may be suspended along with the corporation. Market agencies and dealers defined. Respondents were market agencies since they held themselves out as agents buying on commission. In the absence of an express agreement to the contrary, pencil shrink must be passed along by a market agency or dealer. There is no need to prove actual injury or predatory intent when a fiduciary defrauds principals with respect to prices or weights. Even slight false weighing is a serious violation, and one false weighing violation can be considered a "practice." Since false weights always involve record-keeping violations, in addition to trade-practice violations, and the violations are intertwined, any suspension order is based on the trade-practice violations only. Complainant's investigators were not prohibited by the regulations from showing respondents' records to respondents' principals. The criteria in the statute relating to imposing civil penalties are not applicable to suspension orders. Violations of a fiduciary duty are regarded as particularly serious violations of the Act. Severe sanction policy summarized. Ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act.

Dennis Becker, for Complainant.
David E. Vohs, Sioux City, Iowa, for Respondents
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, hereinafter "the Act").* An initial Decision and Order was filed on October 17, 1986, by Administrative Law Judge Victor W. Palmer (ALJ, now Chief), ordering respondents jointly or severally (except Brown), to cease and desist from: engaging in a course of business of obtaining money by false or deceptive pretenses in connection with livestock purchases or sales; entering into agreements with any other person for the same purpose; misrepresenting to principals, or any others, the true nature of purchase prices or weights, or buying service charges; preparing and issuing false livestock marketing documents and accounts; inserting or omitting information in records causing a false record of livestock transactions; collecting payment, or aiding others to collect, from purchasers of livestock on the basis of false accounts; and misrepresenting to buyers the terms and conditions of sale. Additionally, respondent Brown was ordered to cease and desist from misrepresenting livestock sales terms and conditions; while the other respondents were ordered to keep and maintain true and accurate accounts under the Act.

The order suspends the corporate respondent as a registrant under the Act, and prohibits the other respondents from operating subject to the Act for a period of 6 months.

On November 26, 1986, respondents appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).** The case was referred to the Judicial Officer for decision on June 3, 1987.

See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson Agricultural Law, ch. 3 (1981 and 1987 Cum. Supp.), and Carter, *Packers and Stockyards Act* 10 Harl, Agricultural law, ch. 71 (1980).

**The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953 *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory program since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

Based upon a careful consideration of the entire record, the init Decision is adopted as the final Decision in this case, with a few changes additions indicated by brackets, and omissions indicated by dots. The or is essentially the same as that of the ALJ, except that the corpor respondent's two alter egos (Crowl and DeHaan) are also suspended fo months. Additional conclusions by the Judicial Officer follow the AL conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under Title III of the Packers a Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*, hereinafter " Act"), instituted by a complaint filed on September 5, 1985, and amended October 10, 1985, by the Administrator, Packers and Stockya Administration, United States Department of Agriculture.

The amended complaint charges, *inter alia*, that the corporate respondc Western States Cattle Co. (hereinafter "the corporate respondent") under t [ownership,] direction, management and control of respondents Tom M. Cro (hereinafter "Crowl") and Gary D. DeHaan (hereinafter "DeHaan"), acting the agent for various principals, held itself out as an order buyer to su principals, purchased livestock on the order of those principals, ar fraudulently and arbitrarily increased the weight of the livestock either direct or by failing to pass on to such principals "shrink" granted to it by the selle of the livestock, and fraudulently and arbitrarily increased the price of th livestock. The complaint also alleged that with respect to the transaction involved in the proceeding, the corporate respondent, under the [ownership, direction, management and control of respondents Crowl and DeHaar prepared or caused to be prepared false records, including false sales invoice showing the improperly increased prices and sales weights. In addition, th complaint alleged that the respondent Merritt Brown (hereinafter "Brown") acting as an employee or agent of the corporate respondent, took orders from buyers and represented to such buyers that the fee for the services of the corporate respondent was $.50 per hundredweight when he knew or should have known that the corporate respondent was increasing the purchase prices and weights. The amended complaint also alleged that the corporate respondent and the respondents Crowl, DeHaan and Brown, by word, act and deed, fraudulently represented to the various buyers that the cattle were being sold to them on a commission basis, and that the only profit to the various respondents would be commissions paid, when the various respondents knew or should have known that they were not passing shrink, and were otherwise increasing the price of the cattle. Finally, the amended complaint alleged that the corporate respondent, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, failed to keep and maintain accounts, records and memoranda which fully and correctly disclosed all the transactions of its business subject to the Act, including purchase and sales invoices, work sheets, load sheets and scale tickets showing the true and accurate weights of the livestock purchased, and the correct prices which it paid for such purchases.

The respondents' answer to the amended complaint denied the commission

of the violations alleged, and claimed that the transactions were sales made by the corporate respondent acting in the capacity of a dealer buying and selling for its own account, and that the transaction involving increased weight was an "obvious clerical error." The answer by the respondents further stated that they had been told by representatives of the Packers and Stockyards Administration that "the records kept by the corporate Respondent complied with requirements of the Act." As an affirmative defense, respondents further alleged that "representatives of the Packers and Stockyards Administration violated the Regulations of the United States Department of Agricultural Marketing Service, Packers and Stockyards Act 201.96, in that agents and employees of the United States, without the consent of the dealer . . . [omission in original] divulged and made known to customers facts and information regarding the business of the dealer which information had been obtained through the examination and inspection of the business records of the dealer by the agents and employees of the United States", as a result of which all actions by the complainant were in violation of respondents' Fourth and Fifth amendment rights.

Upon completion of various preliminary procedural steps, I held a hearing in this proceeding on April 14, 15, and 16, 1986, in Sioux City, Iowa. Complainant was represented by Dennis Becker, Office of the General Counsel, United States Department of Agriculture. The respondents were represented by David E. Vohs, Sioux City, Iowa. At the hearing, complainant withdrew allegations respecting 6 of the 20 transactions cited in the complaint, and moved to amend paragraph 2 of its request for relief but later withdrew this motion. At the close of the hearing, a schedule for briefing was set which was later revised. Briefing was completed on September 25, 1986.

Upon consideration of the record evidence and the proposed findings, conclusions, briefs and arguments by the parties, an order is being entered requiring the corporate respondent and each of the individual respondents to cease and desist from unfair and deceptive practices they employed in their dealings with purchasers of livestock; requiring each of them [except respondent Brown] to keep and maintain full and correct accounts and records respecting all transactions under the Act; suspending the corporate respondent [and its alter egos, Crowl and DeHaan] as . . . registrant[s] under the Act for a period of six months; and prohibiting each of the three individual respondents from operating subject to the Act for a period of six months.

The proposed findings and conclusions, submitted on complainant's behalf by Mr. Becker, have been found to accord with the evidence of record and controlling Departmental policy and case law. They are, therefore, incorporated and adopted herein as this Decision's findings and conclusions. The "Argument" section of Mr. Becker's brief, with minor changes, is likewise incorporated and attached as the Decision's "Discussion" section.. Respondents' proposed findings and conclusions have been rejected for the reasons stated in complainant's reply brief.

One aspect of the Order requires pointed explanation. The prohibitions placed against respondents Crowl, DeHaan and Brown, which bar them from operating subject to the Act for a period of six months, is a sanction not

[expressly] specified [in the sanction sections of] the Act. However, in *In re Doug Welch, d/b/a W.W. Garry, et al.*, 45 Agric. Dec. [1932, 1955 (1986)], the Judicial Officer imposed this sanction against a non-registrant for a one-year period as part of the sanction policy he enunciated on the Department's behalf. The Department's sanction policy is controlling and under it, the individual respondents conducted fraudulent and deceptive practices. This case definitely warrants the imposition of the sanction as requested by complainant.

Findings of Fact

1. Western States Cattle Company is a corporation organized and existing under the laws of the State of Iowa. Its business mailing address is R.D. 1 Lawton, Iowa 51030. (Amended Complaint I(a); Answer I(a)).

2. Respondent Western States is and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for its own account (Answer I(b)(1)), and in the business of a market agency buying livestock in commerce on a commission basis for other parties; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account. (Complaint I(b); Answer I(b)(2)).

3. Tom M. Crowl and Gary D. DeHaan are individuals who are the principal owners of Western States. Crowl is the president and DeHaan is the vice president and secretary of the corporate respondent. These individuals are responsible for the direction, management and control of the corporate respondent (Complaint I(c); Answer I(c)).

4. Respondent Merritt Brown is an individual with a mailing address at Route 4, Box 137, Kearney, Nebraska 68847. (Complaint I(d)). Respondent Brown was at all material times herein:

(a) Engaged in the business of buying livestock in commerce on a commission basis as the employee or agent of the corporate respondent; and

(b) Not registered with the Secretary of Agriculture, but subject to registration as a dealer to buy and sell livestock in commerce for his own account and/or as the employee or agent of the vendor or purchaser of such livestock. (TR. 475-477)[1]

5. The corporate respondent was incorporated in 1979, and registered as a dealer in livestock with the Packers and Stockyards Administration of the United States Department of Agriculture during that year. Respondent Crowl was the president of the corporate respondent, and respondent DeHaan was the vice president and secretary thereof. The corporate respondent has remained registered as a dealer with the Packers and Stockyards Administration continuously since 1979, and the two aforementioned individual respondents have held their respective positions with the corporate respondent since 1979. (TR. 389; RX 5) [Each owns 50% of the corporate respondent, which has no other employees, except respondent Brown (TR. 379, 415, 420).]

6. The corporate respondent has advertised itself as an order buyer since

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[1]"TR" throughout this [initial decision] will reflect reference

1979 in various ways. Its invoices or bills of sale have stated at the top thereof "Licensed & Bonded Order Buyers". (CX 2A) Business cards of the corporate respondent have stated that they are "Licensed & Bonded Order Buyers". (CX 5) The 1985 telephone directory for Sioux City reflected that the corporate respondent was an order buyer. (CX 6)

7. Respondent Brown has held himself out as an order buyer for the corporate respondent. (TR. 149) His business card reflects such status. (CX 5)

8. When a business acts as an order buyer with respect to transactions subject to the Act, it acts in a fiduciary capacity for the benefit of the purchaser of livestock. It is commonly accepted that such order buyer will charge the purchaser for its services a commission plus other expenses which the parties agree upon such as transportation and insurance. It is also a universal practice in the industry that an order buyer, when it purchases cattle for delivery to its principal, will pass on any shrink granted by the seller thereof to the purchaser. (TR. 18-20, 49, 60-62, 94-96, 142-145, 360)

9. Shrink is the weight allowance granted by a seller of cattle to a purchaser or order buyer because of an expected decrease in weight between the time the cattle are purchased and the time they arrive at their destination. It is almost always, if not always, expressed in percentage terms of the weight of the cattle at the time of sale. It is frequently called pencil shrink. The purpose of shrink, among other things, is to assure the buyer of cattle that he does not pay for more weight than that which he receives. Otherwise, a seller could easily inflate the weight of cattle with fill in the form of feed and water just prior to sale, thereby misleading the buyer as to the actual weight of the cattle. (TR. 18-20, 61, 95, 145)

10. It is a long accepted practice in the purchase and sale of cattle for shrink to accompany the cattle from the seller to the ultimate receiver. Therefore, if a middleman purchases cattle on behalf of a buying customer, and receives shrink from the seller, the middleman or order buyer is required to pass on the full amount of the shrink granted to the customer unless the parties negotiate otherwise. This is because the shrink is for the benefit of the ultimate receiver, not for the benefit of the middleman who operates on a commission basis. (TR. 20-22, 61-62, 69, 96, 145)

11. Order buyers covered by the Act are required to maintain appropriate records with respect to each transaction in which they purchase cattle on behalf of a customer. Among the records that they are required to maintain are weight records of the cattle at time of purchase, work sheets, load sheets, and true and accurate weights of the livestock purchased, along with the correct prices which are paid for such purchases.

12. Clarence Kenkel of Defiance, Iowa, purchased 61 head of cattle through the corporate respondent on or about June 28, 1984. Respondent DeHaan dealt with Mr. Kenkel on the transaction. (TR. 432-433) Mr. Kenkel understood that Western States was acting as an order buyer. The corporate respondent purchased, and was invoiced for the cattle on June 28, 1984, by Saunders, Bucher, Barber Livestock of Lexington, Kentucky, which was the same day on which the corporate respondent invoiced Mr. Kenkel. The total

weight of the 61 steers was 50,305 pounds. However, the corporate respondent was granted a 2% shrink allowance of 1,006 pounds, reducing the weight on which it made payment at $59 per hundredweight to 49,299 pounds, for a total purchase price of $29,086.41. There were no trucking or insurance charges. The corporate respondent charged Mr. Kenkel $30,434.53, based on a weight of 50,305 pounds, thereby failing to pass on the shrink granted by the seller. Although Mr. Kenkel understood he was to pay a commission of 50¢ per hundredweight for the cattle, the corporate respondent charged him $60.50 per hundredweight on the inflated weight, an increase of $1.50 per hundredweight on such inflated weight, as a result of which it realized excess profits in the amount of $1,101.62 since at 50¢ a hundredweight it should have realized a profit of $246.50. (Complaint, Transaction No. 3; CX 2, 2C; TR 66-68).

13. Clarence Kenkel of Defiance, Iowa, purchased 176 head of cattle through the corporate respondent on or about June 21, 1984. Respondent DeHaan dealt with Mr. Kenkel on the transaction. (TR. 434) The corporate respondent held itself out as, and Mr. Kenkel understood that the corporate respondent was acting as an order buyer with respect to this transaction. The corporate respondent purchased from and was invoiced for the cattle on June 21, 1984, by Western Order Buyers, Inc., Plainview, Nebraska, which was the same day on which the corporate respondent invoiced Mr. Kenkel. The total weight of the 176 steers was 151,720 pounds, and the corporate respondent received a 2% shrink allowance of 3,034 pounds for a total pay weight of 148,686 pounds, for which it paid Western Order Buyers at the rate of $59.50 per hundredweight for a total purchase price of $88,468.17. The corporate respondent passed on to Mr. Kenkel the 2% shrink allowance. There were no trucking or insurance charges. The corporate respondent charged Mr. Kenkel $89,955.03, or $60.50 per hundredweight. At 50¢ a hundredweight it should have realized a profit of $1,486.86. Mr. Kenkel understood he was to pay a commission of 50¢ per hundredweight for the cattle. Therefore, the corporate respondent realized excess profits of 50¢ per hundredweight in the total amount of $743.43. (Complaint, Transaction No. 13; CX 3, 3G; TR. 68-69).

14. Clarence Kenkel of Defiance, Iowa, purchased 63 head of cattle through the corporate respondent on or about May 1, 1985. Respondent DeHaan dealt with Mr. Kenkel on the transaction. (TR. 434) The corporate respondent held itself out as, and Mr. Kenkel understood that the corporate respondent was acting as an order buyer with respect to this transaction. The corporate respondent purchased the cattle from George Klitzke, of Lemmon, South Dakota. It issued an invoice to Mr. Kenkel on May 2, 1985, with respect to these cattle. The total weight of the 63 steers was 51,180 pounds. There was no shrink allowance granted with respect to these cattle. There was a trucking charge of $1,071.00, and there were no insurance or other charges. The cattle cost the corporate respondent $29,816.13, plus $1,071.00 for trucking for a total cost of $30,887.13. The corporate respondent charged Mr. Kenkel $63.90 per hundredweight, laid in, or $32,704.02. Although Mr. Kenkel understood he was to pay a commission of 50¢ per hundredweight for the cattle, the corporate respondent charged him $3.55 per hundredweight more than it paid, which increase included trucking, as a result of which it realized total profits of $745.89. At 50¢ a hundredweight the corporate

respondent should have realized a profit of $255.90. Having realized a total profit of $745.89, it realized an excess profit of $489.99. Its total cost was $60.35 per hundredweight. (Complaint, Transaction No. 14; CX 3, 3H; TR. 69-70).

15. Lazy K, Inc., owned by Francis Kenkel of Defiance, Iowa, purchased 54 head of cattle through the corporate respondent on or about September 28, 1984. Respondent DeHaan dealt with Mr. Kenkel on the transaction. (TR. 432) The corporate respondent held itself out as, and Mr. Kenkel understood that the corporate respondent was acting as an order buyer with respect to this transaction. The corporate respondent purchased, and was invoiced for the cattle on September 28, 1984, by Saunders, Bucher, Barber Livestock of Lexington, Kentucky. The corporate respondent issued an invoice to Lazy K on September 29, 1984, with respect to the 54 steers involved. The total weight of the 54 head was 47,505 pounds. However, the corporate respondent was granted a 2% shrink allowance of 950 pounds, reducing the weight on which it made payment at $57.25 per hundredweight to 46,555 pounds, with a total purchase price of $26,652.74. There were no trucking or insurance charges in the transaction. The corporate respondent charged Lazy K $27,909.19, based on a weight of 47,505 pounds, thereby failing to pass on the shrink granted by the seller. Although Mr. Kenkel understood that Lazy K was to pay a commission of 50¢ per hundredweight for the cattle, the corporate respondent charged Lazy K $58.75 per hundredweight on the inflated weight, an increase of $1.50 per hundredweight on such inflated weight, as a result of which it realized excess profits in the amount of $1,023.67, since at 50¢ a hundredweight it should have realized a profit of $232.78. (Complaint, Transaction No. 1; CX 2, 2A; TR. 99-100).

16. Lazy K, Inc., of Defiance, Iowa, purchased 57 head of cattle through the corporate respondent on or about October 3, 1984. Respondent Crowl dealt with Mr. Francis Kenkel of Lazy K on the transaction. (TR. 389-402) The corporate respondent held itself out as, and Mr. Kenkel understood that the corporate respondent was acting as an order buyer with respect to this transaction. The corporate respondent purchased, and was invoiced for the cattle on October 3, 1984, by Saunders, Bucher, Barber Livestock of Lexington, Kentucky. The corporate respondent invoiced Lazy K for the cattle on October 4, 1984. The total weight of the 57 steers was 51,595 pounds. However, the corporate respondent was granted a 2% shrink allowance of 1,032 pounds, reducing the weight on which it made payment at $57.25 per hundredweight to 50,563 pounds, with a total purchase price of $28,947.32. There were no trucking or other charges. The invoice issued by the corporate respondent to Lazy K showed that commission fees were included in the total price charged, as were inspection fees. The corporate respondent charged Lazy K $30,312.06, based on a weight of 51,595 pounds, thereby failing to pass on the shrink granted by the seller. Although Mr. Kenkel understood Lazy K was to pay a commission of 50¢ per hundredweight for the cattle, the corporate respondent charged it $58.75 per hundredweight on the inflated weight, an increase of $1.50 per hundredweight on such inflated weight, as a result of which it realized excess profits in the

amount of $1,111.92, since at 50¢ a hundredweight it should have realized a profit of $252.82. The corporate respondent showed on its invoice to Lazy K that commissions and inspection fees were included in the total price. It showed that the seller of the cattle, Saunders, Bucher, Barber Livestock paid the trucking fees. (Complaint, Transaction No. 2; CX 2, 2B; TR. 100-102).

17. Lazy K, Inc., of Defiance, Iowa, purchased 69 head of cattle through the corporate respondent on or about March 26, 1984. Respondent DeHaan dealt with Mr. Francis Kenkel of Lazy K on the transaction. (TR. 433) The corporate respondent held itself out as, and Mr. Kenkel understood that the corporate respondent was acting as an order buyer with respect to this transaction. The corporate respondent purchased, and was invoiced for the cattle on March 26, 1984, by Highmore Livestock Exchange of Highmore, South Dakota, the same day on which the corporate respondent invoiced Lazy K. The total weight of the 69 heifers was 50,300 pounds. Highmore Livestock Exchange did not grant a shrink allowance, and none was granted to Lazy K by the corporate respondent. There was a trucking charge of $673.20, but there was no insurance charge. The corporate respondent paid Highmore Livestock Exchange $61.00 per hundredweight for a total cost of $30,683.00. It charged Lazy K $62.25 per hundredweight or $31,311.75, plus $673.20 for trucking for a total cost of $31,984.95. Although Mr. Kenkel understood he was to pay a commission of 50¢ per hundredweight for the cattle, the corporate respondent charged Lazy K $1.25 per hundredweight more than the corporate respondent paid for the cattle, as a result of which the corporate respondent realized an excess profit in the amount of $377.25, since at 50¢ a hundredweight it should have realized a profit of $251.50. (Complaint, Transaction No. 7, CX 3, 3A; TR. 102-103).

18. Lazy K, Inc., of Defiance, Iowa, purchased 55 head of cattle through the corporate respondent on or about April 24, 1984. Respondent Crowl dealt with Mr. Francis Kenkel of Lazy K on the transaction. (TR. 389, 411) The corporate respondent held itself out as, and Mr. Kenkel understood that it was acting as an order buyer with respect to this transaction. The corporate respondent purchased, and was invoiced for the cattle on April 24, 1984, by Saunders, Bucher, Barber Livestock of Lexington, Kentucky, which was the same day on which the corporate respondent invoiced Lazy K. The total weight of 55 steers was 45,835 pounds. However, the corporate respondent was granted a 2% shrink allowance of 917 pounds, reducing the weight on which it made payment at $61.25 per hundredweight to 44,918 pounds, for a total purchase price of $27,512.28. There were no trucking charges. If there were insurance charges, they were included in the total cost. The corporate respondent passed on the shrink allowance given by Saunders, Bucher, Barber ' ivestock to Lazy K. The corporate respondent charged Lazy K $28,118.67, ased on the weight of 44,918 pounds, for the 55 head of livestock. Although Ir. Kenkel understood Lazy K was to pay a commission of 50¢ per ndredweight for the cattle, the corporate respondent charged it $62.60 per undredweight or $1.35 per hundredweight more than it paid for the cattle, s a result of which it realized excess profits in the amount of $381.80, since t 50¢ a hundredweight it should have realized a profit of $224.59. The orporate respondent showed on its invoice to Lazy K that commissions were ncluded in the total price, as were inspection fees. It showed that the seller f the cattle, Saunders, Bucher, Barber Livestock paid the trucking fees

(Complaint, Transaction No. 8; CX 3, 3B; TR. 103-107).

19. Lazy K, Inc., of Defiance, Iowa, purchased 61 head of cattle through the corporate respondent on or about April 30, 1984. Respondent DeHaan dealt with Mr. Francis Kenkel on the transaction. (TR. 433) The corporate respondent held itself out as, and Mr. Kenkel understood that it was acting as an order buyer with respect to this transaction. The corporate respondent purchased and was invoiced for the cattle on May 1, 1984, by Saunders, Bucher, Barber Livestock of Lexington, Kentucky, which was the same day on which the corporate respondent invoiced Lazy K. The total weight of the 61 steers was 51,685 pounds. Saunders, Bucher, Barber Livestock did not grant any shrink allowance with respect to these cattle. The corporate respondent was invoiced at $61.00 per hundredweight by Saunders, Bucher, Barber Livestock for a total purchase price of $31,527.85. There were no trucking or insurance charges. The corporate respondent charged Lazy K $32,354.81, based on a weight of 51,685 pounds, or $62.60 per hundredweight. Although Mr. Kenkel understood Lazy K was to pay a commission of 50¢ per hundredweight for the cattle, the differential charged by the corporate respondent was $1.60 per hundredweight, as a result of which it realized excess profits in the amount of $568.53 since at 50¢ a hundredweight it should have realized a profit of $258.43. Subsequently, the corporate respondent reimbursed Lazy K $511.65 as an adjustment with respect to one steer which was not in accordance with contract specifications. The corporate respondent derived an adjustment of $516.85 on this steer from Saunders, Bucher, Barber Livestock, and ultimately paid it net $31,011.00 with respect to this transaction. (Complaint, Transaction No. 9; CX 3, 3C; TR. 103-107).

20. Lazy K, Inc., of Defiance, Iowa, purchased 133 head of cattle through the corporate respondent on or about May 2, 1984. Respondent DeHaan dealt with Mr. Francis Kenkel on the transaction. (TR. 433) The corporate respondent held itself out as, and Mr. Kenkel understood that it was acting as an order buyer with respect to this transaction. The corporate respondent purchased and was invoiced for the cattle on May 2, 1984, by Saunders, Bucher, Barber Livestock of Lexington, Kentucky, which was the same day on which the corporate respondent invoiced Lazy K. The total weight of the 133 steers was 107,755 pounds. However, the corporate respondent was granted a 2% shrink allowance of 2,155 pounds, reducing the weight on which it made payment at $61.00 per hundredweight to 105,600 pounds, for a total purchase price of $64,416.00. There were no trucking or insurance charges. The corporate respondent passed on the shrink allowance to Lazy K and charged it $66,000.00, based on the shrink weight of 105,600 pounds. Although Mr. Kenkel understood Lazy K was to pay a commission of 50¢ per hundredweight for the cattle, the corporate respondent charged it $62.50 per hundredweight, or $1.50 per hundredweight more than it paid for the cattle, as a result of which it realized excess profits in the amount of $1,056.00 since at 50¢ a hundredweight it should have realized a profit of $528.00. (Complaint, Transaction No. 10; CX 3, 3D; TR. 105).

21. Lazy K, Inc., of Defiance, Iowa, purchased 115 head of cattle through the corporate respondent on or about June 22, 1984. Respondent DeHaan

dealt with Mr. Francis Kenkel on the transaction. (TR. 433) The corpor respondent held itself out as, and Mr. Kenkel understood that it was acti as an order buyer with respect to this transaction. The corporate respond purchased from and was invoiced for the cattle on June 22, 1984, by West Order Buyers, Inc., of Plainview, Nebraska, which was the same day on wh the corporate respondent invoiced Lazy K. The total weight of the 115 ste was 99,240 pounds. However, the corporate respondent was granted a shrink allowance of 1,985 pounds, reducing the weight on which it m payment at $59.50 per hundredweight to 97,255 pounds, for a total purch price of $57,866.73. The corporate respondent did not pay either truck charges or insurance. It charged Lazy K $58,839.28, based on the weight a shrink of 97,255 pounds. Although Mr. Kenkel understood Lazy K was to a commission of 50¢ per hundredweight for the cattle, the corpor respondent charged it $60.50 per hundredweight, or $1.00 per hundredwei more than it paid for the cattle, as a result of which the corporate respond realized excess profits in the amount of $486.27 since at 50¢ a hundredwei it should have realized a profit of $486.28. Two steers died en route to L K's place of business. Lazy K was reimbursed by Western States for t cattle The record does not reflect whether Western States was reimburs by Western Order Buyers for the dead steers. (Complaint, Transaction N 11, CX 3, 3E, TR. 107-108).

22 Lazy K, Inc , of Defiance, Iowa, purchased 49 head of cattle throu the corporate respondent on or about July 24, 1984. Respondent Crowl dea with Mr Francis Kenkel on the transaction. (TR. 389, 432-34) The corpora respondent held itself out as, and Mr. Kenkel understood that it was acting an order buyer with respect to this transaction. The corporate responde purchased and was invoiced for the cattle on July 24, 1984, by Saunder Bucher, Barber Livestock of Lexington, Kentucky, which was the same day o which the corporate respondent invoiced Lazy K. The total weight of the 4 steers was 47,845 pounds. However, the corporate respondent was granted 2% shrink allowance of 960 pounds, reducing the weight on which it mad payment at $60.25 per hundredweight to 46,885 pounds, for a total purchas price of $28,248.21. Trucking was stated to have been included in the tota purchase price, and insurance was stated to have been provided by Saunders, Bucher, Barber Livestock. The corporate respondent passed on the 2% shrink allowance, and charged Lazy K $28,951.49, based on a weight of 46,885 pounds Although Mr. Kenkel understood Lazy K was to pay a commission of 50¢ per hundredweight for the cattle, the corporate respondent charged it $61.75 per hundredweight, or $1.50 per hundredweight more than it paid for the cattle, as a result of which it realized excess profits in the amount of $468.85, since at 50¢ a hundredweight it should have realized a profit of $234.43. The invoice submitted by the corporate respondent to Lazy K showed that there was a commission included in the total price charged, as were an inspection fee, insurance and trucking. However, no papers were provided with respect to any inspection fee, insurance, or trucking. (Complaint, Transaction No. 12; CX 3, 3F; TR. 108-109).

23. S L.S. Farms of Columbus, Nebraska, purchased 56 head of cattle through the corporate respondent on or about October 12, 1984. Respondent Brown dealt with Mr. Gale Schafer on the transaction. (TR. 146) The corporate respondent and respondent Brown held themselves out

Mr. Schafer understood that the corporate respondent and respondent Brown were acting as an order buyer with respect to this transaction. The corporate respondent purchased and was invoiced for the cattle on October 10, 1984, by Bedford Sales Company of Bedford, Iowa. The corporate respondent invoiced S.L.S. Farms on October 11, 1984. The invoice was prepared by respondent Brown. Subsequently, a second invoice was prepared by the corporate respondent on October 12, 1984, in Lawton, Iowa. The total weight of the 56 heiferettes was 46,655 pounds. With respect to two head, Bedford Sales did not provide any shrink allowance to the corporate respondent. With respect to the other 54 head, Bedford Sales permitted it a shrink allowance of 3%, or 1,350 pounds. Therefore, the total weight of the 56 head on which the corporate respondent made payment was 45,305 pounds. It paid a total of $22,425.97 at $49.50 per hundredweight for the 56 heiferettes. Trucking cost $720.00, which included insurance for the transportation. The corporate respondent paid the trucking company the $720.00. It charged S.L.S. Farms $23,887.99, based on a weight of 46,205 pounds. It passed on to S.L.S. Farms 1% of the 3% shrink allowance granted by Bedford Sales Company with respect to 54 of the heiferettes. Therefore, it failed to pass on the shrink granted by the seller in the amount of 900 pounds. Although Mr. Schafer understood that S.L.S. Farms was to pay a commission of 50¢ per hundredweight for the cattle, the corporate respondent charged it $51.70 per hundredweight on the inflated weight, or $2.20 per hundredweight on such inflated weight more than it paid for the cattle. From the total profit of $1,462.01, there must be deducted $720.00 for freight and insurance, leaving a gross profit of $742.01. Merritt Brown was paid $371.01 and the corporate respondent received $371.00 with respect to this transaction. Therefore, it derived excess profits in conjunction with respondent Brown in the amount of $515.49 since it should have received a commission of $226.53 based on the weight of 45,305 pounds after shrink had been granted. The invoice submitted by respondent Brown showed that a commission, inspection fees, and trucking charges were included in the total price. The invoice submitted by the corporate respondent showed that a commission and trucking fee were included in the total price. (Complaint, Transaction No. 5; CX 2, 2E; TR. 148-150).

24. S.L.S. Farms of Columbus, Nebraska, purchased 86 head of cattle through the corporate respondent on or about August 8, 1984. Respondent Brown dealt with Mr. Gale Schafer on the transaction. (TR. 146) The corporate respondent and respondent Brown held themselves out as, and Mr. Schafer understood that the corporate respondent and respondent Brown were acting as an order buyer with respect to this transaction. The corporate respondent purchased and was invoiced for the cattle on August 8, 1984, by Saunders, Bucher, Barber Livestock of Lexington, Kentucky. On August 9, 1984, the corporate respondent invoiced S.L.S. Farms, such invoice being mad out by respondent Brown. The invoice was reissued by the corpora respondent in Lawton, Iowa. The total weight of the 86 steers was 53,[illegible] pounds. However, the corporate respondent was granted a 2% shri allowance of 1,060 pounds by Saunders, Bucher, Barber Livestock, reduc

the weight on which it made payment at $65.00 per hundredweight to 51,975 pounds, for a total purchase price of $33,783.75. There were no trucking or insurance charges. The corporate respondent charged S.L.S. Farms $34,300.20 for the cattle. Respondent Brown received $206.81 on the transaction. The corporate respondent also received $206.82 on the transaction. Therefore, the corporate respondent, in conjunction with respondent Brown, received excess profits in the amount of $256.57 since it should have received profits of only $259.88 based upon the total weight of 51,975 pounds. Both the invoice prepared by respondent Brown and the invoice prepared by the corporate respondent showed a commission and a trucking fee were included in the total price. (Complaint, Transaction No. 16; CX 3, 3J; TR. 150-152).

25. S.L.S. Farms of Columbus, Nebraska, purchased 52 head of cattle through the corporate respondent on or about November 30, 1984. Respondent Brown dealt with Mr. Gale Schafer of S.L.S. Farms on the transaction. (TR. 146) The corporate respondent and respondent Brown held themselves out as, and Mr. Schafer understood that they were acting as an order buyer with respect to this transaction. The corporate respondent purchased, and was invoiced for the cattle on November 30, 1984, by J. L. Calhoun of North Platte, Nebraska. An invoice was issued to S.L.S. Farms on December 1, 1984, by respondent Brown. The invoice was reissued by the corporate respondent in Lawton, Iowa. The total weight of the 52 head was 41,680 pounds. However, the corporate respondent was granted a 2% shrink allowance of 834 pounds, reducing the weight on which it made payment at $49.00 per hundredweight to 40,846 pounds, for a total purchase price of $20,014.54. There were no trucking, insurance or other charges involved in the transaction. The corporate respondent charged S.L.S. Farms $21,239.92, based on the shrunk weight of 40,846 pounds. Although Mr. Schafer understood S.L.S. Farms was to pay a commission of 50¢ per hundredweight for the cattle, the corporate respondent charged it $52.00 per hundredweight, or $3.00 per hundredweight more than it paid for the cattle, as a result of which it realized excess profits in the amount of $1,021.15 since it should have received profits of only $204.23 based upon the total weight of 40,846 pounds. Both the invoice prepared by respondent Brown and the invoice prepared by the corporate respondent showed a commission was included in the total price. Respondent Brown received $612.69 on this transaction. Mr. Schafer accompanied the truck that picked up the cattle at the place of business of J. L. Calhoun, and noted that there seemed to be some discrepancy with respect to the amount of money the corporate respondent was paying for the cattle and the amount of money S.L.S. Farms was being charged for the cattle. Subsequently, he made inquiry of J. L. Calhoun, and discovered the price differential that was involved. (Complaint, Transaction No. 15; CX 3, 3I; TR. 152-157).

26. When Mr. Clarence Kenkel and Mr. Francis Kenkel became aware of the fact that with respect to the transactions described in paragraphs 12 through 22, above, they had paid more than 50¢ a hundredweight for the cattle purchased through the corporate respondent, they ceased doing business with the corporate respondent because they believed they had been cheated and misled as regards the manner in which the corporate respondent was dealing with them, and because they could buy cattle at 50¢ a hundredweight elsewhere. (TR. 71-72, 111-112). As a result of the transaction which

occurred on November 30, 1984 (Finding of Fact 25, above) in which Mr. Schafer accompanied the truck to J. L. Calhoun's place of business, and subsequent inquiries made by Mr. Schafer of that business, S.L.S. Farms ceased doing business with the corporate respondent and respondent Brown because it learned that the corporate respondent and respondent Brown were misleading it as regards the amount of money they were receiving for their activities as order buyers in the purchase of cattle, and because the corporate respondent was failing to pass on all of the shrink to which S.L.S. Farms was entitled as a result of the purchases. (TR. 156-157).

27. On June 20, 1984, the corporate respondent, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, purchased 83 head of cattle from Bob Gammon with a net pay weight of 48,395 pounds. It paid Mr. Gammon $28,051.68 for such cattle. The cattle were resold on that date to Brookman Livestock in Billings, Montana, care of Bill Sheldon in Percival, Iowa, for $29,210.64, with the invoice showing a weight of 48,725 pounds, 330 pounds greater than the weight at the time of purchase. In connection with this transaction, the corporate respondent charged the purchaser and collected from it on the basis of the false and incorrect weights, and prepared or caused to be prepared false records, including false sales invoices, showing the fraudulently increased sales weight. (Complaint, ¶ III; CX 7; TR. 312-320).

Conclusions

1. Between March 1984 and May 1985, Western States, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, held itself out to various principals as an order buyer of cattle, to induce such principals to purchase cattle through it.

2. On at least four occasions between June 1984 and October 1984, the corporate respondent, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, acted as the agent for various principals, held itself out as an order buyer for such principals, purchased livestock on order of those principals, or sold livestock to such principals which it had previously purchased, and fraudulently and arbitrarily increased the weight of such livestock either directly or by failing to pass on to such principals shrink granted to it by the sellers of such livestock, and by fraudulently and arbitrarily increasing the price of such livestock in those same transactions. With respect to one transaction, respondent Brown, acting as an employee or agent of the corporate respondent, took orders from a buyer and represented to such buyer that the fee for the services of the corporate respondent was 50¢ per hundredweight when he knew that the corporate respondent was increasing its purchase prices and weights Respondent Brown was paid one-half of the gross profit received by the corporate respondent in that transaction, less the direct costs.

3. Between March 1984 and May 1985, the corporate respondent, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, acting as the agent for various principals, held itself out as an order buyer for those principals in at least ten separate transactions,

purchased livestock on order of those principals, or sold livestock to thos principals which it had previously purchased, and fraudulently and arbitrari increased the price of such livestock. With respect to two of thos transactions, respondent Brown, acting as an employee or agent of th corporate respondent, took orders from the buyer, and represented to suc buyer that the fee for the services of the corporate respondent was 50¢ p hundredweight when he knew that it was increasing its purchase prices ar weights. In connection with such transactions respondent Brown was pa one-half of the gross profit received by the corporate respondent from su transactions less its direct costs.

4. In connection with the 14 transactions involved in paragraphs 2 and above, the corporate respondent, under the [ownership,] directic management and control of respondents Crowl and DeHaan, prepared caused to be prepared false records, including false sales invoices showi the improperly increased prices and sales weights. Respondent Brov prepared false invoices in three of those transactions.

5. The corporate respondent, and respondents Crowl, DeHaan ar Brown, by word, act and deed, fraudulently represented to various buyers th cattle were being sold to such buyers on a commission basis, and that the on profit to the various respondents would be commissions paid, when the variou respondents knew that they were not passing shrink and were otherwis increasing the price of the cattle.

6. Western States, under the [ownership,] direction, management an control of respondents Crowl and DeHaan, in one transaction, charged th purchaser and collected from it on the basis of false and incorrect weights and prepared or caused to be prepared false records, including false sale: invoices, showing the fraudulently increased sales weight.

7. The corporate respondent, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, has failed to keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions in its business subject to the Act, including purchase and sales invoices, work sheets, load sheets and scale tickets showing the true and accurate weight of the livestock purchase[s] and the correct prices which it paid for such purchases.

8. By reason of the conclusions set forth in paragraphs 1 through 7, above, the corporate respondent and individual respondents Crowl and DeHaan have willfully violated sections 312(a) and 401 of the Act (7 U.S.C. §§ 213(a), 221), and §§ 201.44 and 201.55 of the regulations (9 C.F.R. §§ 201.44, 201.55).

9. By reason of the conclusions set forth in paragraphs 1 through 7, above, respondent Brown has willfully violated section 312(a) of the Act, and is unfit to engage in business subject to the Act. (7 U.S.C. § 213(a)).

10. By reason of the conclusions set forth in paragraphs 1 through 7, above, the corporate respondent and individual respondents Crowl and DeHaan have violated section 401 of the Act, and are unfit to engage in business subject to the Act. (7 U.S.C. § 221).

Discussion

There is nothing novel about the violations involved in this proceeding. They have occurred in other cases, and the rulings have previously held activities of the nature engaged in by the corporate respondent and the individual respondents in this proceeding are in violation of the Packers and Stockyards Act. *In re Collier & Marsh*, 38 Agric. Dec. 957 (1979), [*aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished)]; *In re Spencer Livestock Commission Co. and Mike Donaldson*, [46 Agric. Dec. ___(1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)]. While individual case facts differ, the concept that a business, and the individuals connected therewith, cannot mislead customers as regards the nature of the transactions it has with them is clear.

The evidence is undisputable in this proceeding that the corporate respondent, through the individual respondents, violated the Act. First, they violated the Act by failing to pass on to principals shrink and by arbitrarily increasing the price of such livestock purchased, or simply by arbitrarily increasing the price of such livestock. Second, they violated the Act by increasing the weight above that at which the corporate respondent purchased livestock. Third, the corporate respondent under the [ownership,] direction, management, and control of the respondents Crowl and DeHaan, failed to keep and maintain records as required by the Act. Although each respondent raised defenses, such defenses are spurious

A. ANALYSIS OF THE FACTS.

1. The weight and price violations.

With respect to four transactions, i.e., transaction Nos. 1, 2, 3, and 5 in paragraph II(a) of the Complaint, the evidence shows clearly that the corporate respondent, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, acted as agent for three principals (i.e., Lazy K, Inc., transaction Nos. 1 and 2; Clarence Kenkel, transaction No. 3; and S.L.S. Farms, transaction No. 5), held itself out as an order buyer for those principals, and purchased livestock on order of those principals or sold livestock to them which it had previously purchased, fraudulently and arbitrarily increasing the weight of the livestock either directly or by failing to pass on to those principals shrink granted to it by the sellers of the livestock, and in addition fraudulently and arbitrarily increasing the weight of the livestock in those same transactions. With respect to transaction No. 5 respondent Brown acted as an agent or employee for the corporate respondent.

Clarence Kenkel, Francis Kenkel of Lazy K, Inc., and Gale Schafer of S.L.S. Farms, all testified that it was their understanding that the corporate respondent was acting as an order buyer with respect to the above four transactions. Their testimony was absolutely consistent in this regard. Furthermore, they made it clear that they would not have dealt with the corporate respondent had they known that it was charging more than 50¢ a hundredweight for the cattle it purchased for them for the simple reason that they could always buy cattle through other order buyers for such a commission. Indeed, as the record evidence clearly shows, when each of these

individuals learned that the corporate respondent was deriving more profit than 50¢ a hundredweight they immediately ceased doing business with it because they felt that they had been duped insofar as the transactions were concerned. This is also true with respect to transactions No. 7, 8, 9, 10, 11, and 12, insofar as Lazy K is concerned, transactions No. 13 and 14 insofar as Clarence Kenkel is concerned, and transactions No. 15 and 16 insofar as S.L.S. Farms is concerned. In those latter ten transactions the corporate respondent, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, acted as agent for the various principals, holding itself out as an order buyer, and purchased livestock on order of its principals, fraudulently and arbitrarily increasing the price of such livestock. With respect to transaction Nos. 15 and 16, respondent Brown acted as an employee or agent for the corporate respondent.

The essential and controlling thrust of the violations of Western States, and respondents Crowl, DeHaan and Brown in this regard is that the respondents deliberately misled their principals into believing that they were only paying 50¢ a hundredweight for cattle procured by the respondents on their behalf. This is made manifest by the testimony of the witnesses who stated that with respect to the first transaction each had with the corporate respondent, it advised them through whichever individual they dealt that it was acting as an order buyer charging 50¢ a hundredweight over and above its costs. Thus, while subsequently specific discussions may not have been held in each transaction as regards the charge the corporate respondent was making, each individual continued to believe, and was allowed to believe by the corporate respondent and its agents, that it was acting as an order buyer. Indeed, documentary evidence shows that that is exactly what all the respondents wanted the individual purchasers to believe. The invoices provided by the corporate respondent to all of its customers stated at the top that Western States was acting as "Licensed & Bonded Order Buyers". (See, for example, CX 2A, page 4). Further, the invoices stated at the bottom thereof, "We do not guarantee livestock against sickness or death. The Purchaser agrees that the title of stock listed on this bill shall be retained by us until the check or draft in payment for them is paid. *We act as agents only.*" (Emphasis added). (See, for example, CX 2A, page 4). In addition, the corporate respondent was listed in the telephone directory for Sioux Falls, Iowa, [under] "Livestock Order Buyers". (CX 6, page 3). This listing occurred in spite of the fact that the corporate respondent and individual respondents insisted that Western States was acting as a livestock dealer with respect to the transactions with which we are here concerned. While the Directory had a section for livestock dealers, they did not have themselves listed as a livestock dealer in the telephone directory. (CX 6, page 2). Business cards provided by the corporate respondent to Francis Kenkel and Gale Schafer, the latter being provided by respondent Brown, contained the statements "Licensed & Bonded Order Buyers". (CX 5) Documentary evidence of this nature makes it clear that the respondents intended that their customers know them as order buyers rather than as dealers. In some of the transactions the situation is even more blatant. For transaction No. 2, involving Lazy K, respondent Crowl issued an invoice on behalf of the corporate respondent in which there was placed opposite the word "Commission" on the extension portion thereof the notation "Inc." (CX 2B, page 4). Such was also the case with respect to transaction

No. 5 involving S.L.S. Farms in which Merritt Brown issued the invoice, subsequently reissued by the corporate respondent (CX 2E, page 5); transaction No. 8 in which respondent Crowl stated that the commission was included (CX 3B, page 4); transaction No. 12 involving Lazy K in which respondent Crowl issued an invoice stating that the commission was included (CX 3F, page 4); transaction No. 15 involving S.L.S. Farms in which respondent Brown issued an invoice stating that the commission was included, with such invoice reissued by respondent Crowl (CX 3I, pages 4 and 5); and transaction No. 16, which was exactly the [same] as regards the invoices to transaction No. 15 (CX 3J, pages 4 and 5).

The respondent[s] failed to raise any kind of meaningful defense to the assertions made by the principals, or the documentary evidence which is of record in this proceeding. Indeed, as will be discussed below, the testimony of respondents' witnesses reflects that they knew they were committing violations by acting in the way they did.

Neither did the corporate respondent, through the individual respondents, pass on shrink in four transactions. Every witness for complainant who was asked about shrink stated that it was the custom of the industry for shrink to go with the cattle. (TR. 20, 62, 69, 96, 145, 360) This is necessarily so because cattle shrink in weight during transport, and the purpose of a seller granting shrink is to compensate for the fill in the form of water or feed in the cattle at the time of sale, which fill will be disposed of between the time of sale and the time it is received by the ultimate receiver. This is sometimes known as pencil shrink, and other times dealt with as the weighing condition of the cattle. It is typically a percentage of the total weight of the cattle.

All three principals who testified on behalf of complainant testified clearly that they seldom if ever dealt with dealers because dealing with dealers is not to their benefit. (TR. 63-64, 94, 142-144) Rather they deal with order buyers, typically paying 50¢ a hundredweight commission. (TR. 72, 95-98, 143) Furthermore, they stated that they thought the corporate respondent was acting as an order buyer based upon prior dealings, and the way in which it held itself out on the documents previously discussed. (TR. 62-63, 97-98, 104-105, 108-111, 147-158) The ultimate proof in this regard is that the minute each of the three principals found out that the corporate respondent was making more then 50¢ a hundredweight on the transactions they ceased doing business with it.

Robert Foster, a witness for respondents, stated that 50¢ a hundredweight on order buying transactions is a usual commission today. (TR. 511) He further stated that he knows nothing about the transactions involved in this proceeding. (TR. 511) He also stated that when he was active in the cattle business he always let people know he was charging a commission on his billings. (TR. 512) Certainly, when the corporate respondent and the individual respondents Crowl and Brown put "Inc." opposite the word "Commission" on the invoices, they were clearly stating that they were receiving a commission for the transactions rather than selling as dealers.

Complainant's witnesses all knew what an order buyer is and what the obligations of an order buyer are to a principal. They testified consistently

that an order buyer is a business which buys for the account of a principal, acting in a fiduciary capacity, and that it has an obligation to derive the best deal it can for such principal. (TR. 60, 94, 96, 142) Incredibly, respondents' witnesses, even though they all had been in the business for a number of years, testified that they had no idea what an order buyer is. (TR. 294, 459, 485) Such testimony belies their activities. Such testimony is unbelievable in view of the fact that the term is commonly used in the industry Respondent Crowl had the audacity to testify that even though the corporate respondent had been in business for seven years, and he had been its president during that entire period, he had never sought to learn what was required of a registrant under the Act. Rather, he attempted to place responsibility on the complainant for failing to tell him that. (TR. 391) Such argument is obviously silly. The only conclusion to be drawn is that respondents knew they were being deceitful, and were trying to evade the consequences of having been caught at it.

Respondent Crowl's testimony was also unbelievable insofar as his claims were concerned as regards the purchase of cattle on behalf of principals from Saunders, Bucher, Barber Livestock of Lexington, Kentucky. He stated at one point that "Inc.", as placed on the invoices to the principals meant a previous commission had been paid to Saunders, Bucher and Barber, the very company from which he claimed the corporate respondent had purchased livestock for its own account. (TR. 384). Later in his testimony, with respect to transaction No. 2, he said he had no idea whether a commission was involved. (TR. 407-410) It is incredible to believe that the corporate respondent would pay both a commission and a purchase fee to the business from which it was buying cattle, or alternatively that there was any valid reason for making a notation on its invoice to its principal if someone else paid the commission. Respondent Crowl stated that he never discussed commissions and order buying with any of the principals, and did not even know of the concept of the 50¢ per hundredweight commission prior to the date of the hearing. (TR. 395 - 398). Mr. Crowl testified as follows:

> Q. So when you went into business with Western States in 1979, you really didn't know very much about the purchase and sale of cattle?
>
> A. I relied on other people.
>
> Q. Who did you rely on?
>
> A. People that I had talked to about this, a person that I was beginning a business with. And also as many people as I could find to talk to at that time.
>
> Q. Did they talk about commission --
>
> A. No.
>
> Q. They didn't? Didn't they talk about money that a person generally pays to somebody who provides services?
>
> A. No.

Q. No?

A. No. I was under the impression when we operated this kind of business we were entitled to make as much money as we wanted to make. Kind of like a shoe salesman.

Q. I understand that's what you're telling us. But nobody ever said that a commission merchant makes 50 cents a 100 weight on cattle?

A. Not to my recall.

Q. You mean to tell me that you sat in Lawton, Iowa for seven years, and prior to that time on your father's farm, and you have dealt with cattle and you have not dealt with commission merchants?

A. No.

Q. Well, that's not quite true, is it, sir? Because you told us here a few minutes ago that there was a commission in some of these transactions paid to somebody.

A. That was after I got the business going, not before. You asked me when I started the business. After the business started.

Q. Then you became aware of it?

A. Then I became aware of it.

Q. Okay.

A. In later years.

Q. Later years. When did you finally become aware of it?

A. I don't know, sir. I don't recall.

Q. Well, was it 1979, 1980 that you became aware of the fact that there was a commission?

A. Sir, I don't recall.

* * * * *

Q. (By Mr. Becker) When did you become aware of that?

A. Sir, I said I didn't recall and I don't recall.

Q. You were in this hearing room yesterday when three different witnesses who dealt with Western States testified with respect to buying cattle for 50 cents a 100 weight from Western States, weren't you?

A. Yes, sir, I was?

Q. You knew about 50 Cent commission before that time, did you not?

A. No, I did not.

Q. Not before yesterday?

The invoices almost uniformly showed that the cattle were invoiced to Western States on the same day or sometimes only the day before they were invoiced to the purchasers, i.e., the principals of the corporate respondent. This factor is inconsistent with respondents' claim that they purchased the cattle for their own account, and then sought to find a buyer for them. (TR. 398-401) This is particularly so since respondents did not have their own feed lot. The dates of the sellers' invoices must be taken to be the date of actual transfer of possession to respondents and/or their principals because otherwise as a normal business practice the sellers would charge a daily fee for feeding the cattle, which fee would be reflected in their invoices. Indeed, respondent Brown testified that the date on an invoice shows when title passes. (TR. 484) Furthermore, both Clarence Kenkel and Francis Kenkel testified that initiating phone calls were begun by either themselves or a representative of the corporate respondent, which shows that respondent often was asked to find cattle for them rather than offering to sell cattle to them which it had already found. (TR. 64, 98, 109) This suggests that what really happened was that in all instances, the corporate respondent, through its agent, brought the parties together. It was a middleman.

Respondent Crowl claimed that shrink was passed on to the principals based upon his assessment as to whether it was a desirable thing to do. (TR. 387-388, 400-401) Such claim is unbelievable. This is particularly true since witness after witness testified that shrink should always accompany the cattle. Respondent Crowl testified that many times he did not see the cattle, but rather relied upon the representations of the seller as regards their weighing condition. (TR. 400-401) Respondent DeHaan, on the other hand testified with respect to one purchase from Saunders, Bucher, Barber Livestock that Western States bought for others and took a commission on such purchase. (CX 8; TR. 468). This testimony is inconsistent with the testimony of respondent Crowl. The respondents knew what they were doing!

Respondent Brown is equally culpable. The evidence clearly reflects that in the three transactions in which he was involved he made out invoices to S.L.S. Farms in which he utilized the methodology of putting "INC" after 'Commission" on the invoice. Furthermore, Mr. Schafer was very specific in his testimony as regards his [un]willingness to deal on other than an order buyer basis (TR. 142-144), and how respondent Brown led him to believe he and the corporate respondent were order buyers who would receive a commission of 50¢ a hundredweight. (TR. 146-150) This belies respondent Brown's claim he never discussed compensation with Mr. Schafer. (TR. 496-498) Mr. Schafer's testimony is clearly the credible version. He had nothing to gain from his statements, and it is virtually inconceivable that matters of this nature would not have been discussed.

In summary, in four transactions the respondents are shown by

documentary evidence, as enlarged upon by testimony, to have acted as order buyers with respect to three principals, and to have failed to pass on shrink as well as to have increased the price of the cattle so as to derive more than 50¢ a hundredweight commission with respect to each transaction. With respect to ten transactions the corporate respondent, through each of the individual respondents, dependent upon which transaction was involved, is shown to have acted as an order buyer and increased the price so as to derive a profit greater than the 50¢ a hundredweight it should have received from its principals. There were seldom additional costs such as trucking or insurance which had to be paid by the corporate respondent. When such additional costs were charged they were properly passed on to the principals. Each of the individual respondents knew what he was doing, but chose to mislead the principals so as to achieve his purpose of getting as much money as possible for himself and the corporate respondent.

2. The transaction involving an increase in sales weight.

There was one transaction in which the corporate respondent, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, acted as a dealer. In this transaction it purchased 83 head of cattle from a seller with a net pay weight of 48,395 pounds. It paid the seller $28,051.68 for the 83 head, and resold them for $29,210.64, issuing an invoice showing a weight of 48,725 pounds which was 330 pounds greater then the weight at the time of purchase. The corporate respondent charged the purchaser and collected from it on the basis of the greater weight, and prepared or caused to be prepared false records including a false sales invoice, showing the fraudulently increased sales weight. The corporate respondent, through respondent Crowl, attempted to explain away the transaction as being inadvertent, and only a single instance of a clerical type mistake. However, such is not the case, as was clearly testified to by complainant's investigator and witness, Phil Edwards. The weight change between the time of purchase and sale as reflected by corporate respondent's records was not an inadvertent clerical error. (TR. 316-318). Rather, it is explainable only in terms of being intentional. Inadvertent clerical errors typically are errors in which there is a transposition of numbers or in which rounded dollar amounts such as $400.00 have been added. In the transaction with which we are concerned here the added weight was 330 pounds, which as explained by Mr. Edwards, is four pounds per head of cattle or 332 pounds, rounded down by two pounds to the nearest round number. That is the only logical explanation for this very serious violation. Padding weights is a serious violation of the Act. *In re Boone Livestock Company*, 27 Agric. Dec. 475 (1968); *In re Arnold Fairbank d/b/a Arnold Fairbank Cattle Company*, 27 Agric. Dec. 1371 (1968), [*aff'd*, 429 F.2d 264 (9th Cir. 1970), *reprinted in*] 29 Agric. Dec. 601 (1970); *In re George W. Saylor, Jr.*, 44 Agric. Dec. [2238] (1985) [decision on remand].

5. The records violations.

There can be no doubt that the corporate respondent failed to maintain the proper records. It is required by regulation to maintain records of the weight at which it purchased cattle on behalf of principals. 9 C.F.R. §§ 201.44, 201.55. With almost no exceptions with respect to the 14 transactions involving weight and shrink violations it did not maintain such records. Mr. Edwards, who looked at respondent's records seldom found weight certificates and found none for the transactions involved in this proceeding. (TR. 314, 334-335) He further testified that the records did not fully disclose the true nature of the transactions. (TR. 332)

The corporate respondent, under the [ownership,] direction, management and control of respondents Crowl and DeHaan, clearly falsified records. Respondent Brown was involved in three of the transactions. The issuance of invoices to its principals which contained entries showing that a commission was included, thereby misleading the principals into believing that they were paying a commission to an order buyer, is a serious misrepresentation and falsification of records. There can be no doubt that it was deliberate since it was done in furtherance of the scheme to enlarge profits on the part of the business by hiding the actual amounts of money which the corporate respondent was deriving from each transaction.

B. THE RESPONDENTS VIOLATED THE ACT AND THE REGULATIONS ISSUED THEREUNDER.

Respondents' actions in billing and collecting on weights and prices which were increased, and failing to pass on shrinkage allowances, along with a deliberate endeavor to hide the truth from their principals, constitutes fraud. It is well settled that such fraudulent billing by an agent is a most serious, unfair and deceptive act and practice in violation of section 312(a) of the Act. *In re: Collier & Marsh*, *supra*. See also Decision and Order dated April 17, 1986, of Administrative Law Judge William J. Weber, *In re: Spencer Livestock Commission Co., & Mike Donaldson*, P & S Docket No. 6254, April 17, 1986, *supra* [, *final decision*, 46 Agric. Dec. ___ (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)].

Section 312(a) of the Act states:

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.

By virtue of their course of conduct, the failure to maintain proper records, and the rendering of false accounts, the corporate respondent and the individual respondents have violated section 312(a) (7 U.S.C. § 213(a)) of the Act. The corporate respondent, and the individual respondents by holding themselves out as an order buyer, which is a market agency, engaged in unfair and deceptive practices in the selling [or buying] on a commission basis of livestock in violation of section 312(a). The evidence is clear in this regard.

The corporate respondent and respondents Crowl and DeHaan, because they [owned,] directed, managed and controlled the corporate respondent, are responsible for all 15 violations in this regard. The individual respondent Brown is responsible for the three violations with respect to the transactions involving S.L.S. Farms because he dealt directly with Gale Schafer, the agent of S.L.S. Farms. The evidence is incontrovertible that all the respondents knew what they were doing, and were deliberately misleading their principals with respect to the true nature of the transactions with respect to 14 transactions. It is also clear that the corporate respondent and respondents Crowl and DeHaan violated the Act by charging a purchaser of such cattle based on a weight higher than the actual weight of the cattle sold, i.e., by using false weights.

Having undertaken to operate as a market agency purchasing livestock on commission, the respondents were also required to submit complete and accurate accountings to their principals, and to make copies of bills and payment for all items available to their principals. Section 201.44 (9 C.F.R. § 201.44) of the regulations provides:

> Market agencies to render prompt accounting for purchases on order. Each market agency shall, promptly following the purchase of livestock on a commission or agency basis, transmit or deliver to the person for whose account such purchase was made, or the duly authorized agent, a true written account of the purchase showing the number, weight and price of each kind of animal purchased, the names of the persons from whom purchased, the date of purchase, the commission and other lawful charges, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction.

Section 201.55 (9 C.F.R. § 201.55) provides:

> Purchases and sales to be made on actual weights.
>
> When livestock is bought or sold on a weight basis, settlement therefor shall be on the basis of the actual weight shown on the scale ticket. If the actual weight used is not obtained on the date and at the place of transfer of possession, this information shall be disclosed with the date and location of the weighing on the accountings, bills, or statements issued. Any adjustment to the actual weights shall be fully and accurately explained on the accountings, bills, or statements issued and records shall be maintained to support such adjustment.

By failing to provide accountings to their principals [i] which gave a true written account of the actual weight and price at which the cattle were purchased in four instances, and [ii] which gave a true written account of the actual price at which the cattle were purchased in ten instances, and by failing to give a true written account of the actual weight at which the cattle were sold in one instance, the corporate respondent and the individual respondents Crowl and DeHaan in every instance violated the Act by submitting false accountings so as to accomplish their fraud. This scheme was further

accomplished by the corporate respondent and the individual respondents by their failure to keep and maintain weight tickets showing the scale weights at which cattle were purchased with respect to the four transactions in which shrink was not passed. As set forth in 9 C.F.R. § 201.55 information regarding the actual weight "shall be disclosed with the date and location of the weighing on the accountings, bills, or statements issued."

Respondent Brown is equally culpable. He is an experienced individual in the cattle industry. He knew what he was doing. His method of operation clearly shows an intent to hide the true facts from his principal. The invoices which he rendered to S.L.S. Farms exactly tracked the methodology utilized by the corporate respondent and its officers with respect to the other transactions. He is a dealer as the term is defined in the Act because he traded as an employee or agent of the corporate respondent. (§ 301(d) (7 U.S.C. § 201(d)). As such, he is subject to appropriate sanctions, which in this instance is a prohibition from operating subject to the Act because he is not registered as a dealer. If he were, a suspension of his registration would be appropriate. (7 U.S.C. § 204) The prohibition from such activities has the same effect as a suspension, and is a necessary sanction to assure that those who fail to register are subject to sanction.

The respondents have violated section 401 of the Act (7 U.S.C. § 221). Acting as a market agency for principals, respondents failed to keep and maintain correct copies of purchase invoices and scale tickets. In addition, respondents failed to keep and maintain work sheets which would have accurately shown information concerning the weight and price of livestock purchased and sold.

C. THE APPROPRIATE SANCTION.

The appropriate sanction is a suspension of [both] the corporate respondent [and its two alter egos (Crown and DeHaan)] as . . . registrant[s] under the Act for a period of six months, prohibiting the individual respondents from operating subject to the Act for a period of six months, and the issuance of a cease and desist order to all such respondents.

Complainant has requested that the corporate respondent be suspended as a registrant for six months. Furthermore, complainant requested that each of the individual respondents be prohibited from operating subject to the Act for a period of six months. In addition, complainant requested the issuance of a cease and desist order against the corporate respondent and the individual respondents with respect to the types of violations which have been shown in this proceeding to have been committed by them. Mr. Merle E. Paulsen, the Branch Chief of the Financial Protection Branch of the Packers and Stockyards Administration, testified regarding the appropriate sanction for violations of the nature committed by the respondents. (See generally TR. 337-365). With respect to complainant's theory of the case he stated that:

> Our theory is that the respondents operated as a market agency buying on commission, that they fraudulently increased the prices of livestock sold to principals. That they fraudulently increased the weights of livestock -- sorry, fraudulently increased the price of livestock bought for their principals, fraudulently increased the weight of livestock bought for their principals; and that they failed to make full disclosure to their principals everything in these transactions. (TR. 339).

His testimony with respect to the seriousness of the types of violations involved was as follows:

> Q. Does the Packers and Stockyards Administration consider these violations to be serious?
>
> A. We consider both the fraudulent price increases and the fraudulent weight increases to be serious violations.
>
> Q. Based upon your knowledge of this case what is the appropriate sanction that the Packers and Stockyards Administrations wishes to ask?
>
> * * * * *
>
> A. We believe the appropriate sanction would be a cease and desist order relating to the violations alleged in the complaint, and that the corporate respondent be suspended for a period of six months and registration be suspended and that the individual respondents be prohibited from operating subject to the Packers and Stockyards Act for a period of six months. (TR. 339-340).

When asked what factors were considered in recommending the sanction, Mr. Paulsen stated that complainant considered the number of transactions, the period of time that the investigators looked at, and the seriousness of the transactions, as well as other similar types of cases that had been litigated. (TR. 341). He specifically named *In re: Sidney D. Collier and Lewis Paul Marsh*, 38 Agric. Dec. 957 (1979) [, *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished)], in which there was a cease and desist order and a six-month suspension. (TR. 342). He also mentioned a case which had yet to be decided *In re: Spencer Livestock Commission Co., and Mike Donaldson*, P&S Docket No. 6254, *supra* [*final decision*, 46 Agric. Dec. ____ (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988)]. In that case the Administrative Law Judge granted a ten-year suspension for violations of the same nature. However, it should be noted that Mike Donaldson was a third time violator. (TR. 342). Mr. Paulsen, speaking for the agency, stated that the fact the number of violations proved on hearing was less than the number alleged in the complaint did not have a bearing on the agency's conclusion that a six-month suspension of the corporate respondent's registration and prohibition of the individual respondents from operating in the industry, as well as the issuance of a cease and desist order are the appropriate sanction. (TR. 348-349). When asked by Judge Palmer whether the prior history of the

respondents had been considered, Mr. Paulsen stated that it had been, and that there had been no prior violations. He also considered the monetary impact that a six-month suspension on the respondents would have. He stated that it would put the respondents out of business for such period of time. (TR. 359). The sanction requested by the agency is consistent with the sanction policy of the Secretary. See *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

The individual respondents have been shown to be the moving force behind the violations involved in this proceeding. Complainant has advised that if they were registered under the Act, the complainant would seek to suspend such registrations for a period of six months. [However, under the Department's sanction policy, respondents Crowl and DeHaan, as alter egos of the corporate respondent, will be suspended just like the corporate respondent.] If they were to seek registration directly or indirectly at this time, the complainant would deny such applications because they are unfit to engage in business subject to the Act as a result of the violations. The individual respondents may not operate subject to the Act without being registered. Therefore, it is appropriate that the order reflect that they are prohibited from operating subject to the Act so as to assure that all interested parties know that the complainant has imposed sanctions on the individual respondents as well as the corporate respondent.

It is clear from the nature of the violations, and agency policy as well, that six-month suspension of registration of the corporate respondent [(and its two alter egos)], and a prohibition from operating in the industry as regards the individual respondents for that same period of time is called for. It must be recalled that the investigation carried on by the Packers and Stockyards Administration covered only a four-month period. (TR. 308-309). While some of the transactions involved in the proceeding occurred outside of that four-month investigatory period, those transactions were brought to the attention of the complainant by principals of the respondents as a result of the investigation, not directly from the investigation. (TR. 309) Therefore, it is clear that the investigation covered only a sample period of time.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend on appeal that the ALJ's findings and conclusions are not adequately supported by the record, but the record abundantly supports the ALJ's findings and conclusions. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required.[2] Respondents' five arguments on appeal, in this respect, merely reargue matters that were fully considered and correctly decided by the ALJ.

A close examination of the transcript, the ALJ's initial decision, and the appellate pleadings, reveals that respondents are not taking great issue with the facts found herein. Rather, the thrust of respondents' appeal is that, *inter alia*, the ALJ misinterpreted the law, misapplied the regulations, and

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[2]*See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1979).

mistakenly defined respondents' activities as that of an order buyer instead of a dealer.

Respondents' arguments lack merit, and, since there are only five issues raised, each will be addressed, *seriatim*. But, before that, it would be helpful to set forth the standard of review in these types of cases, should respondents seek further review in a Federal court.

Findings of fact by ALJ's are consistently given great weight by the Judicial Officer. As stated in *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ___, slip op. at 176-77 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988):

> The superior advantages of the ALJ, who saw and heard the witnesses testify, for determining their credibility, including determining the expertise and credibility of expert witnesses, is well recognized. As stated in *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 479-80 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953), on appeal from a decision by USDA's Judicial Officer:
>
> > Often the "most telling part" of the evidence is not apparent from the printed page, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors". N.L.R.B. v. Universal Camera Corp., 2 Cir., 190 F.2d 429, 430. Thus, "we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth." Ohio Associated Tel. Co. v. N.L.R.B., 6 Cir., 192 F.2d 664, 668.
> >
> > . . . In addition, the technical and complex nature of the charges made necessitated recourse to extensive use of expert testimony, for here, as is often the case in proceedings under regulatory statutes, the evidence is largely of a dual nature: statistical and parol interpretation of the statistics. In the latter aspect the referee [ALJ] again possesses a greatly advantageous position, for, as the several experts testify, he is able to ascertain their grasp and knowledge, their perspective and understanding of the materials presented to them for interpretation. Their conduct on the stand may enhance or belie their status as experts. In short, anyone who has observed witnesses on the stand will know that those "who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of courts of review who do not enjoy the same advantages." Jennings v. Murphy, 7 Cir., 194 F.2d 35, 36.
> >
> > It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of the fact was justified, i.e. acted reasonably in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings. To go further

... most telling part of the evidence. N.L.R.B. v. Universal Camera Corp., supra. With this in mind we approach the proof offered in this proceeding.

Similarly, in *Cella v. United States*, 208 F.2d 783, 788 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), a case involving false weights under the Packers and Stockyards Act, the court stated:

> The hearing officer observed these witnesses upon the stand. He was the trier of the facts. The matter of their credibility was for him to decide. Great Western Food Distributors v. Brannan, 7 Cir., 201 F.2d 476, 479.

Finally, in *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), also involving false weights under the Packers and Stockyards Act, the court stated:

> When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. National Labor Relations Board v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); see also United States v. Oregon Medical Society, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

Accord Blackfoot Livestock Comm'n Co. v. USDA, 810 F.2d 916 (9th Cir. 1987).

Notwithstanding the weight that is properly given to an ALJ's findings of fact, such findings of fact are not binding on the Judicial Officer, and his judgment may be substituted for that of the ALJ on all questions. However, I agree here with all of the ALJ's findings, and where the ALJ's facts are adopted, they become almost unassailable. Points and authorities underlying these principles were recently restated in *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. ____, slip op. at 17-20 (Apr. 29, 1988), as follows:

> [I]t is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJ's, since they have the opportunity to see and hear the witnesses. However, the ALJ's findings are not sacrosanct, and I am entirely free to substitute my judgment for that of the hearing officer on all questions. It is important to note here that where there is the possibility of drawing two inconsistent inferences from the evidence, I am not prevented from drawing one. Also, the overruling of an ALJ's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. If my inferences are supported by substantial evidence, they cannot be set aside even though the reviewing court could draw a different inference. When I reach different or opposite results from the ALJ, the ALJ's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. Where I have overruled an ALJ's findings, in many cases, based upon credibility determinations, I have relied on documentary evidence or inferences from the facts. The points and authorities for this statement

of law and practice on the reversal of an ALJ's findings were recently restated in *In re Collins*, 46 Agric. Dec. ____, slip op. at 15-18 (Mar. 4, 1987), as follows:

> It is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJ's since they have the opportunity to see and hear the witnesses testify (footnote omitted). When an agency *adopts* findings of fact by an ALJ based on credibility determinations, the task of the reviewing court is easier than when the agency overrules such findings, i.e., an ALJ's findings of fact based on credibility determinations, adopted by the agency, are almost unassailable. *Blackfoot Livestock Comm'n Co. v. USDA*, [810 F.2d 916, 920-21 (9th Cir. 1987)]. As stated in Davis, 3 *Administrative Law Treatise* § 17.16, at 336 (2d ed. 1980):
>
> > When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." NLRB v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); International Union v. NLRB, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); NLRB v. Stark, 525 F.2d 422, 425-26 (2d Cir. 1975), cert. denied 424 U.S. 967 (1976); NLRB v. Columbia University, 541 F.2d 922, 928 (2d Cir. 1976).
>
> However, Professor Davis makes it clear that an agency is in a different position vis-a-vis an ALJ's findings of fact based on credibility determinations than a reviewing court. He states (*id.* at 327):
>
> > Because of the provision of § 557(b) that "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses, and even despite the hearing officer's observation of the witnesses. The law that had been established before the APA continues: "Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner." NLRB v. Tex-O-Kan Flour Mills, 122 F.2d 433, 437 (5th Cir. 1941).

Moreover, Professor Davis explains that an agency can overrule an ALJ's findings based on credibility determinations irrespective of whether a very substantial preponderance of the evidence supports the agency's decision. He states (*id.* at 332) that the "orthodox doctrine" consistent with Supreme Court decisions is set forth in *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Quoting from the court's decision rather than the abbreviated version in Professor Davis' treatise (*ibid.*):

> The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *National Macaroni, supra.* If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni, supra.*
>
> The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 138 U.S.App.D.C. 152, 425 F.2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. OKC Corp. v. Federal Trade Commission, 455 F.2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra.*

Accord Blackfoot Livestock Comm'n Co. v. USDA, [810 F.2d 916, 920-21 (9th Cir. 1987)].

Respondents' five arguments raised on appeal are as follows (Respondents' Appeal Petition, Nov. 26, 1986):

Issue I

The decision of the Administrative Law Judge in imposing the sanction of a 6-month suspension barring the corporate respondent and individual respondents from operating subject to the Act for a period of 6 months is contrary to law.

Distilled to its essence, respondents' argument here is that since only the corporate respondent was "registered," only the corporate respondent may be suspended under 7 U.S.C. § 204. Relying on *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91 (D. Minn. 1945), respondents would have the prohibition removed as to respondents Crowl, DeHaan and Brown, leaving only the cease and desist part of the order applying to these respondents.

This argument is without merit for a number of reasons. Parenthetically, I note that respondents are actually relying on the consolidated case of *Barton v. United States*, which was one of three factually similar cases decided simultaneously by the *Midwest Farmers* court. Respondent Barton was registered at the time of the proceedings, but did not happen to be registered at the time of his (Barton's) transgressions under review in the proceedings. The court noted that during the pertinent time period "Barton was not, we think, a registered dealer between January, 1937, and January 2, 1940" (*Midwest Farmers, supra*, at 100), when the violations occurred. Moreover, the *Midwest Farmers* court was quite clear that the Secretary's right to suspend depends upon violations committed by a registered dealer or market agency, whose registration was in force at the time of the acts, and stated (*id.*:

> A fair consideration of the amendment authorizing the Secretary to suspend strongly suggests that the right to suspend depends upon acts in violation of the Act which were committed when the dealer or market agency was registered as such and during the time when such registration was in force.

My analysis reveals that the *Barton* facts, which led to this decision above may apply to respondent Brown, but they do not help respondents Crowl and DeHaan. Barton's sanction in his case was reversed under 7 U.S.C. § 204 because he did not fit within the plain wording of the statute. He was not a *registrant*. However, other remedies, as pointed out by the *Midwest Farmers* court, were available to the Secretary to sanction Barton, where the court stated (*Midwest Farmers, supra*, at 101):

> Obviously, the other remedies available to the Secretary under the Act remain in the event the Secretary desires to utilize them. We merely hold that the particular remedy of suspension must be limited to an order revoking a registrant's right to operate as "such registrant" for violations of the Act committed while the registration sought to be suspended was in force.

These other remedies will be applied to respondent Brown, *infra*.

However, respondents Crowl and DeHaan come squarely under 7 U.S
§ 204. The use of nominal companies to mask wrongdoing is not allowed
the Department, and the corporate veil is routinely pierced to exp
respondents to liability for their wholly-owned companies' wrongdoing. Wh
the individual respondents own 100% of the stock of the respondent compa
and are responsible for the day-to-day operation, management, and control
the practices and activities of the company, the corporate veil is routin
pierced to impose a sanction on the responsible individual respondent. Th
statement of law and practice was recently set forth in *In re White*, 47 Agr
Dec. ___, slip op. at 125-26 (Jan. 11, 1988), *appeal docketed*, No. 88-3144 (6
Cir. Feb. 22, 1988), as follows:

> B. When a Respondent's Wholly-Owned Entities Violate the Department's Regulations, the Corporate Veil Is Routinely Pierced, Holding the Respondent Liable for the Actions of its Agencies.
>
> The Department routinely pierces the "corporate veil" to hold a respondent liable for the actions of its wholly-owned subsidiaries. Here, respondent attempts, throughout the record, to draw exculpatory distinctions between its sole proprietorships--Covington Sales Company and S&W Livestock. Although the Initial Decision is apparently written as interpreting the respondent's Answer to paragraph I of the complaint as admitting dominion and control by respondent over his 100%-owned businesses, I want to make clear that the usage of nominal companies to mask wrongdoing is not allowed by the Department.
>
> This Departmental practice of piercing the corporate veil to expose respondents to liability for their wholly-owned companies' wrongdoing is routine. In the recent case of *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. ___, slip op. at 14 (Apr. 13, 1987), the Department's routine piercing of the corporate veil was described, as follows:
>
> > However, as has been found, the individual respondent owned 100% of the stock of respondent and was responsible for the day-to-day operation, management and control of the practices and activities of respondent company. Under such circumstances, the corporate veil has been pierced to impose a sanction on the responsible individual respondent. *In re Trenton Livestock, Inc.*, 41 A.D. 1965, 1971-1980 (1982); *In re Pastures, Inc.*, 39 A.D. 395, 397-401 (1980); *In re Norwich Veal and Beef, Inc.*, 37 A.D. 1202, 1205 (1978); *Livestock Marketers v. United States*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *Bruhn's Freezer Meats v. United States Department of Agriculture*, 438 F.2d 1332 (8th Cir. 1971). . . .
>
> Let there be no question herein that respondent is liable for the actions of its wholly-owned proprietorships, Covington Sales Company and S&W Livestock, under the policy described in *Rotches, supra*. Moreover, respondent's attempts to draw exculpatory distinctions between its operating units, through creative bookkeeping techniques, properly drew the closest scrutiny of the regulatory agency.

Thus, for regulatory purposes, the respondents and the respondent corporation are one and the same. To find otherwise could open the door to greater mischief, if nonregistrants could escape sanction, or receive different or lesser sanctions, by operating through a (perhaps sham) registered corporation. Specifically, the same suspension order can be issued against the *alter egos* of a registered corporation as is issued against the corporation. As stated by complainant (Complainant's Reply to Respondents' Appeal at 3-4 (Dec. 15, 1986)):

> Respondents' misconstrue the nature of their registration. Respondents Crowl and DeHaan have registered under the corporate name of Western States Cattle Company, and for business and/or personal reasons have conducted their business through a corporation. This in no way shields the individual respondents from the regulatory consequences of their business, however. It is the position of the complainant that individuals who are the alter ego of a registered corporation are themselves registered and thus subject to suspension in the same manner as is the corporation for violations of the Act. As the corporation's *alter ego,* Crowl and DeHaan and Western States are one and the same, and the registration of the corporation constitutes registration of the individuals.

Now, we return to respondent Brown. There is no question that respondent Brown committed the violations charged, and we are here solely dealing with the proper sanction. The situation concerning Brown is somewhat like that concerning respondent Barton in *Barton v. United States*, discussed, *supra*. Barton committed violations while he was not registered, and the *Midwest Farmers* court there invited the Secretary to apply other remedies than suspension in these situations.

Complainant's analysis of Brown's situation is accurate and appropriate when complainant states (Complainant's Reply to Respondents' Appeal at 4-6 (Dec. 15, 1986), as follows:

> With respect to respondent Brown, it is both appropriate and lawful that he be prohibited from engaging in business in the packers and stockyards industry for a period of six months. Pursuant to section 303 of the Act (7 U.S.C. § 203) the Secretary may require that every person operating as a market agency or dealer, as defined in section 301 of the Act, register. The Secretary has done this through regulation. Pursuant to 9 CFR § 201.10(a):
>
> > "every person operating or desiring to operate as a market agency or dealer as defined in section 301 of the Act shall apply for registration under the Act. . . ."
>
> The Secretary is not required to register persons who are unfit, however. Pursuant to Section 201.10(b):

". . . If the Administrator has reason to believe that the applicant is unfit to engage in the activity for which application has been made, a proceeding shall be promptly instituted in which the applicant will be afforded opportunity for full hearing in accordance with the rules of practice governing such proceedings, for the purpose of showing cause why the application for registration should not be denied. . . ."

The above provisions make clear that in terms of the statutory and regulatory scheme the Secretary has determined that he will require every person who operates as a market agency or dealer to be registered in some fashion. Persons operating as the *alter ego* of a corporation derive their registration through the corporate registrant. Other persons, such as respondent Brown, do not derive such registration through a corporate entity, but rather must be registered in their own capacity. That respondent Brown failed to register does not insulate him from the remedial provisions of the Act. Simply stated, he must be registered to engage in business as a dealer or market agency, in accordance with section 303 of the Act and without such registration he is prohibited from engaging in such business.

In this case, respondent Brown has been found to have committed serious violations of the Act. If respondent Brown were registered, the violations would warrant a six-month suspension. Since, he is not registered, however, the violations warrant a finding of unfitness to engage in business subject to the Act. In effect, the Agency has found respondent Brown unfit to apply for registration for a period of six months, and pursuant to section 303 of the Act (7 U.S.C. § 203), he is prohibited from engaging in business as a dealer or market agency without being registered. To provide otherwise would permit a violator of the Act to escape the imposition of a meaningful sanction merely by refusing to register. This would do grievous harm to the regulatory purpose of the registration requirements.

. . . .

Again for purposes of clarity, however, complainant requests that the findings and conclusions of the Administrative Law Judge be modified to include a conclusion that respondent Brown is unfit to engage in business subject to the Act as a dealer or market agency, and that the order be modified as follows:

Respondent Brown shall not be registered to engage in business as a dealer or market agency for a period of six months. Pursuant to section 303 of the Act (7 U.S.C. § 203) and section 201.10 of the regulations (9 CFR § 201.10), respondent Brown is prohibited from engaging in business as a dealer or market agency without being registered.

The ALJ's findings and conclusions herein are modified to reflect my alysis and conclusions concerning respondents' Issue I.

One last matter in respondents' *Issue I* needs clarification. Respondents gue (RAP at 3), as follows:

The Administrative Law Judge relies on the case of Doug Welch d/b/a W. W. Garry et al, as his authority for the sanction imposed against the Respondents Crowl, DeHaan and Brown. That decision was a consent decision consented to by Doug Welch, which is different than the situation that exists herein, in that there has been no consent to a particular sanction.

As such the ruling of the Administrative Law Judge was in error suspending the Respondents Crowl, DeHaan and Brown, the remedy being cease and desist if a violation were found.

The passage from the ALJ's decision to which respondents refer reads in its entirety as follows (Initial Decision at 5):

> One aspect of the Order requires pointed explanation. The prohibitions placed against respondents Crowl, DeHaan and Brown which bar them from operating subject to the Act for a period of six months, is a sanction not specified by the Act. However, in *Doug Welch, d/b/a W. W. Garry, et al.*, P. & S. Docket No. 6537, 45 Agric. Dec. [1932, 1955 (1986)], the Judicial Officer imposed this sanction against a non-registrant for a one year period as part of the sanction policy he enunciated on the Department's behalf. The Department's sanction policy is controlling and under it, the individual respondents conducted fraudulent and deceptive practices. This case definitely warrants the imposition of the sanction as requested by complainant.

While it is true that the other respondents in the *Welch* proceeding consented to certain sanctions, such is not the case with respondent Michael Benson, referred to on pages 33-34 of the slip opinion [p. 1955 of 45 Agric. Dec.], *supra* (which, by the way, is entitled "Decision and Order as to Michael Benson"). Respondent Benson contested this proceeding vigorously, but in the end, received a civil penalty and a prohibition from engaging in business (*In re Welch*, 45 Agric. Dec. 1932, 1955-56 (1986)), as follows:

> In assessing a civil penalty, the Act requires consideration of the "gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). Since respondent Michael Benson is not the owner of a business, the "gravity of the offense" should largely determine the civil penalty here. But, inasmuch as respondent Michael Benson's earning ability is limited (Tr. 268-70, 379-80), the $10,000 civil penalty should be payable in equal monthly installments over a 3-year period.
>
> For the foregoing reasons, the following order should be issued.
>
> **ORDER**
>
> . . . .
>
> Respondent Michael Benson is found to be unfit to engage in business subject to the Packers and Stockyards Act and shall not engage in business or operate subject to the Act as a market agency,

... livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying and selling livestock in commerce, either on his own account or as the employee or agent of the vendor or purchaser, for a period of 1 year.

Thus, respondents' argument in *Issue I* that the ALJ erred in using th *Welch* case because it rests on a consent decision is completely incorrect Consequently, the ALJ committed no error in referring to Michael Benson' sanction (unfit to operate under the Act for 1 year) while Benson wa operating as an agent or employee of one of the corporate respondents in a commission-splitting arrangement very similar to that of respondent Brown in the proceeding at bar. Brown's situation, then, is strictly analogous to that of Benson, and it is a good basis for support of the sanction given to Brown *under other than* a 7 U.S.C. § 204 remedy.

Each of the individual respondents (Crowl, DeHaan and Brown) will receive a sanction patterned after that given Michael Benson in the *Welch* case, but for the civil penalty. Any other result would allow respondents to evade sanction, and immediately set up another, perhaps fraudulent, livestock marketing enterprise.

Respondents' second argument on appeal is presented, as follows:

Issue II

The Administrative Law Judge was in error when he determined Western States Cattle Company, which was registered as a dealer, was a market agency when the only basis for the same was the invoices of Western States Cattle Company which stated thereon "order buyer".

The ALJ, who saw and heard the witnesses testify, found and concluded, on the basis of overwhelming evidence, that with the single exception of the weight fraud alleged in ¶ III of the complaint (discussed in Finding 27 and Conclusion 6), the corporate respondent, through the activities of the individual respondents, held itself out as an agent, buying livestock as an order buyer for a 50¢ per cwt commission for the principals involved in this case. Such a person is, by definition, a market agency, rather than a dealer. The terms *market agency* and *dealer* are explained in *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 180-85 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), as follows:

> The Act defines the terms "stockyard services," "market agency," and "dealer" as follows (7 U.S.C. § 201(b)-(d)):
>
> When used in this chapter--
>
> . . . .
>
> (b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, [of] livestock;

> (c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and
>
> (d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

Under the plain terms of the Act, any person who engages in the business of "buying . . . livestock on a commission basis" is a *market agency*. The term *dealer* is defined as "any person, not a market agency," engaged in certain activities. Accordingly, once a person fits the definition of a market agency (e.g., because he buys on commission), he cannot possibly be a dealer within the meaning of the Act. "Of course, statutory definitions of terms used therein prevail over colloquial meanings." *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 502 (1945).[48]

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[48] *Accord United States v. A. & P. Trucking Co.*, 358 U.S. 121, 124 (1958); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958); *M.E. Blatt Co. v. United States*, 305 U.S. 267, 279 (1938); *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 95-96 (1935).

If the statutory definition of dealer had omitted the words "not a market agency," a person engaged in the business of buying livestock on commission would fit the definition of "market agency" and "dealer." But there is no basis for refusing to give effect to the words "not a market agency" in the definition of "dealer." As stated in *Ex parte The Public National Bank of New York*, 278 U.S. 101, 104 (1928):

> No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that "significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"

Respondents' argument that if Mr. Donaldson acted as an agent, he was a dealer, not a market agency, within the meaning of the Act is based on erroneous obiter dictum in *Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 720 (10th Cir. 1977). The issue in *Solomon* was whether a custom feedlot operator, that was primarily engaged in the business of feeding livestock for absentee owners (such as lawyers and judges), was required to register and post a bond as a dealer because it "aids" its customers in "the purchasing of livestock which are then placed at the Solomon Feedlot for feeding" and "in the sale of the cattle

... and not charge a commission for such buying and selling activities (557 F.2d at 720). "Both sides concede[d] that Solomon is not a market agency" (557 F.2d at 719), undoubtedly because Solomon did not charge a commission for buying or selling activities. In holding that Solomon Feedlot was not a dealer, the court said (557 F.2d at 720):

> It would appear that the three groups of people engaged in purchasing livestock as dealers include (1) packers-buyers who are employed by packing plants to acquire cattle for slaughter; (2) commission people such as order-buyers; and (3) speculators, who buy in their own name to resell.
>
> The literature of the Packers and Stockyards administration supports this view of the Act. See PA-399, *The Packers and Stockyards Act, What It Is--How it Operates.* The above groupings are recognized in that literature which also recognized the distinction between the one who is regulated because he is engaged in the business in accordance with the statute and one who makes profit as a result of improving the animals.

As shown above, "commission people such as order-buyers" cannot possibly be dealers, under the Act, since they are included under the express definition of the term "market agency," and the term "dealer" is defined as "any person, not a market agency" (7 U.S.C. § 201(d)). Accordingly, the court's obiter dictum is erroneous.

The *Solomon* decision and the literature of the Packers and Stockyards Administration cited in *Solomon* is discussed in *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 227-29 (1980), *appeal dismissed by appellant*, No. 80-1293 (10th Cir. Aug. 11, 1980), as follows:

> 23/ Presumably, the Court was referring [in the last sentence of its opinion quoted two paragraphs above] to the statement in the pamphlet, p. 2, that "[f]armers, ranchers, and feeders who are not dealers in interstate commerce are not required to register or file bond when buying to restock." . . .
>
> ---
>
> . . . I issued the P&S literature relied on by the Court when I was Administrator of the Packers and Stockyards Administration. . . . The literature "explains" the Packers and Stockyards Act regulatory program in six pages. It is a pamphlet designed as a "hand-out" to farmers or other persons interested in the Act in a very general way. It does not purport to go into all of the precise ramifications of the Act. In giving a general over-view of those subject to regulation, the pamphlet states (pp. 1-2):
>
> > All interstate transactions in livestock-- cattle, sheep, swine, horses, mules and goats--are subject to the provisions of the Packers and Stockyards Act.

SUBJECT TO REGULATION

More specifically subject to regulation under the law, when *operating in interstate commerce*, are:

> Stockyards--both terminal and auction markets which charge for services and are open to the public.
>
> Market agencies--persons or firms which buy or sell livestock on commission or furnish other services in connection with the purchase or sale of livestock.
>
> Dealers--persons or firms engaged in the business of buying and selling livestock for speculative purposes.
>
> Packer buyers--persons regularly employed by packers to purchase livestock for slaughter.
>
> Meat packers--whether buying livestock at stockyards, at their packing plants or in the country.

. . . .

In other literature distributed by the agency during the same general time period, the term dealer was defined in broader terms. In PA-810, Questions and Answers on the Packers and Stockyards Act for Livestock Producers (USDA, P&SA, July 1967), it is stated at p. 1:

> Q. Under the Act, what is (1) a market agency, and (2) a dealer?
>
> A. (1) A market agency is defined as any person engaged in the business (interstate) of (a) buying or selling livestock on a commission basis, or (b) furnishing stockyard services.
>
> (2) A dealer is defined as any person, not a market agency, engaged in the business (interstate) of buying or selling livestock either on his own account or as the employee or agent of the vendor or purchaser. Dealers are *often* called traders or speculators, as they *usually* buy with the intention of reselling immediately. (Packer-buyers are considered as dealers buying for slaughter only) [Emphasis added [in *Sterling*]].

It is readily apparent that the literature cited by the court in *Solomon* does not support its obiter dictum that "commission people such as order-buyers" are "dealers." It is obvious that the court in *Solomon* was merely trying to show that custom feedlot operators are not included in the category of dealers. The court did not have before it the issue as to whether order-buyers buying on commission are dealers, as distinguished from market agencies. In fact, the court in *Solomon* does not even quote the definition of "market agency."

Based upon the testimony and the documentary evidence, the record is overwhelming that respondents held themselves out to be, and solicited business as, a market agency. The ALJ properly sets out this overwhelming evidence in the Initial Decision under the ANALYSIS OF THE FACTS, subsection 1 (The weight and price violations), set forth on pages 28-37, *supra*. Complainant's witnesses testified that the respondents, in each of the first transactions between them, deliberately led them to believe that, as principals, they were only paying 50¢ a hundredweight commission for cattle procured on their behalf. Subsequent transactions are shown (through testimony and documentary evidence) to be calculated to perpetuate the belief that respondents acted only as agents (Tr. 62-63, 97-98, 104-05, 108-11, 147-58).

For instance, the invoices respondent corporation provided to the principals, and its business cards, bore the legend that Western States acted as "Licensed & Bonded Order Buyers" (CX 2A, p. 4; CX 5). The bottom of the invoices stated "*We act as agents only*" (CX 2A, p. 4). Respondents' advertising in the local phone directory was under the same type of identification "Livestock Order Buyers" (CX 6, p. 3). Interestingly, respondent corporation was not listed in the same phone directory as a dealer (CX 6, p. 2). Moreover, on numerous occasions (see, pp. 30-31, *supra*), respondents filled in the blank opposite the word "commission" on its invoices with the notation "Inc.," meaning included.

Respondents contend that the notations that commissions were included on some of the invoices involved in this case refer to commissions respondents paid to someone else, rather than to commissions of respondents included in he total invoice price (Tr. 383-84, 386, 409-10). That same argument made by Mr. Donaldson, alter ego of the Spencer Livestock Commission Company, was rejected in *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ___, slip op. at 46-48 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), since here is no reason why a person acting as a dealer would tell the person buying livestock from him what commissions he had paid to someone else. *Spencer* states (*ibid*):

> Mr. Kienow testified as an expert witness for complainant that the reference in the memorandum to 50¢ commission included would refer to respondents' commission of 50¢ per cwt (Tr. 478-81). Mr. Kienow's testimony, in this respect, is consistent with my own view, based on briefing and arguing Packers and Stockyards Act cases in appellate courts for 10 years, directing the Packers and Stockyards Act regulatory program for 8 years, and deciding cases under the Packers and Stockyards Act for 15 years.

However, Mr. Frye, a CPA who works for a number of livestock firms, testified that the reference to a commission would refer to a commission Donaldson paid to someone else. He testified (Tr. 670-71, emphasis added):

. . . .

Nonetheless, Mr. Frye conceded that in a dealer transaction, there is no reason for a dealer to tell the person to whom he is selling livestock what commissions or other expenses the dealer paid. Mr. Frye testified (Tr. 683):

> JUDGE WEBER: Why would someone purchasing cattle from a dealer be concerned about commissions the dealer may have had, expenses the dealer may have had, arrangements the dealer may have had with the people that he purchased cattle from? It is not an ultimate purchaser's business, is it?
>
> Do you see what I am driving at? The purchaser under my hypothesis gets a price from the dealer and he either agrees to pay that price or he doesn't, and what the dealer's prior costs or arrangements were, aren't really material or relevant, are they?
>
> THE WITNESS: No, sir.

Similarly, respondent Donaldson testified that the reference to commissions could have meant a commission he paid to somebody else, although he could offer no explanation as to why commissions paid to somebody else would be of concern to feeders (such as Schaake). Mr. Donaldson testified (Tr. 819-20; emphasis added):

> JUDGE WEBER: . . . In some instances in the exhibits where people had asked you for documentation, they made notes on information provided by phone and in some instances, there were commissions or abbreviations suggesting the word "commissions" included in the information. Why would the word "commissions" or an abbreviations that perhaps suggests commissions be included in their notes, if you know.
>
> THE WITNESS: I don't know, but if they received the phone call from me, *it could have meant a commission paid to somebody else*. I really couldn't tell you without looking at a particular document.
>
> JUDGE WEBER: If their focus is just on the delivered cost at their expense, why do they care who you paid or what you paid if they are willing to pay your price at their front door? Why would that show up in their notes.
>
> THE WITNESS: I really couldn't tell you.

The 50¢ commission reference in the memorandum is consistent only with a market agency transaction in which respondents were buying for Schaake on a 50¢ commission basis. It is totally inconsistent with a dealer transaction.

In a dealer transaction, the dealer is selling livestock at a specified price, e.g., $65.50 per cwt. It is totally irrelevant to the buyer from a dealer what the dealer paid for the livestock, either in commissions to someone else or otherwise. There could have been no logical reason for Donaldson to have referred to commissions paid by Donaldson to someone else, in a telephone conversation with Schaake's accountant, Claude Johnson, if a dealer transaction were involved. Hence the memorandum of Donaldson's telephone conversation with Claude Johnson, set forth above, is strong and compelling evidence supporting Schaake's testimony, discussed below (§ II(A)), that his agreement with Donaldson was for Donaldson to purchase livestock for Schaake on a 50¢ commission basis.

Furthermore, in a number of the transactions (those in which respondents bought the livestock involved in this case from Saunders, Bucher, Barber Livestock, respondents bought the livestock directly from that dealer firm, and paid no commission (CX 2B, p. 2; CX 3B, p. 2; CX 3F, p. 2; CX 3J, p. 2). Respondent DeHaan admitted that they paid Saunders, Bucher, and Barber a "straight dollar price for hundredweight" when they bought livestock directly from that dealer firm, stating (Tr. 447-48; and see Tr. 461-62):

Q. So how did the business operation with Saunders, Butcher, Barber work? You buy cattle from them?

A. That's right.

Q. And then you resell them to somebody else?

A. That's right.

Q. And they charge you so much a hundred weight; is that right?

A. It makes a difference. They'll be calling now on cattle to come off rye and wheat pretty soon.

Q. They'll be calling, who is "they"?

A. Saunders, Butcher and Barber.

Q. They say, hey, we got cattle we'd like to sell you?

A. Right.

Q. And then you say okay, let me see whether I want it?

A. I would ask them what the cattle are going to cost me.

Q. Do you ever go down and look at the cattle?

A. I have.

Q. Is that a frequent occurrence for you?

A. No, not that often.

Q. So you're looking for a straight dollar price for hundred weight?

A. That's right.

Q. When you buy from Saunders, Butcher.

A. Right.

Q. You've always done it?

A. That's right.

Respondent Crowl's testimony that he paid a commission to Saunders, Bucher, and Barber is contrary to respondent DeHaan's testimony, just quoted, and is confused, illogical, and contrary to the manner in which livestock is bought and sold in the United States. Mr. Crowl testified (Tr. 403-06; and see Tr. 408-09):

Q. What's the date of that check?

A. Just a minute, sir. Tenth month, fourth day.

Q. To whom was that check written?

A. S & B Livestock.

Q. Take a look at the next page. What is that document?

A. That's a bill of sale to Lazy K, Incorporated.

Q. What's the date of the bill of sale?

A. Same date.

Q. Okay. When, and you told us earlier, I think the letters I-N-C indicated that a commission had been paid to someone else?

A. Yes, sir.

Q. To whom had that commission been paid for that transaction?

A. I would imagine in this transaction it would be S & B Livestock.

... the livestock was paid a commission?

A. Pardon?

Q. You paid a commission to the prior owner of the livestock?

A. Yes, I did, sir.

Q. Why?

A. Because that's a commission he demanded for the trade that we made with him.

Q. The commission that you demanded for --

A. Wait a minute. The commission that he demanded, not I demanded.

Q. The commission he demanded for the trade he did with you?

A. Yes.

Q. Did he own the livestock before you did?

A. I guess so. I bought it from him.

Q. Well, then, why did he need a commission?

A. I don't know.

Q. How much --

A. I imagine --

Q. Go ahead.

A. No. I'll answer your question.

Q. How much was that?

A. I don't recall, sir.

Q. Why isn't it reflected in these documents?

A. I don't recall.

Q. Would you have such documents on file in your office?

A. I rather doubt it at this time. I don't know. If there is we could urely find them.

Q. Would you mind trying to?

A. I could find them, yes.

Q. How would they have been kept in your records in your office?

A. How would they have been kept in our records in our records in our office? There are no records in our office, sir. They're all kept in our accountant's office which Mr. Edwards had looked through.

Q. And how would they be kept in the records in your accountant's office?

A. I have no idea. I imagine on file like most records are.

Q. Do your records come in to you first?

A. Pardon?

Q. Do documents come to you first before they go to your accountant?

A. Yes, sir.

Q. You ever to look at them?

A. Sometimes, sometimes not.

Q. Well, don't you have a pretty good idea of how much --

A. You don't realize, sir, that there's more than one --

Q. Please answer my question.

A. All right.

Q. Don't you have a pretty good idea as to how much you're going to pay for commission?

A. Sometimes. Depends on how the transaction goes down.

Q. You going to pay 50 cents?

A. Not necessarily.

Q. 25?

A. Don't know. Whatever the man asks. There's no set rule on commissions.

Q. Well, was Saunders, Butcher, Barber acting as a commission merchant, order buyer? Looks to me like they were acting as a seller, but you can correct me.

A. Says dealers and feeder cattle, doesn't it?

Q. Where do you see it?

A. Right up there on --

Q. Is that what you understood they acted as?

since respondents bought directly from Saunders, Bucher, Barber Livestock, a dealer, without going through any middleman or agent, respondents would have paid no commission to Saunders, Bucher, Barber Livestock, and, therefore, when respondents showed that commissions were included on those same livestock transferred the same day to the principals involved in this case, the reference to commissions included could only refer to the fact that the commissions respondents were charging their principals were included in the total purchase price. The fact that an order buyer's commission is frequently not separately stated, but is included in the total purchase price, is explained in *Spencer, supra*, slip op. at 150-56, as follows:

> V. An Order Buyer's Commission Is Not Separately Stated (but Is Included in the Delivered Cost to the Principal) in About Half of the Livestock Commission Transactions.
>
> The fact that respondents' commission was not separately stated on the invoices to Schaake, Monson and Van de Graaf is not a circumstance detracting in any manner from the strong evidence set forth above proving that the 17 transactions involved here were commission transactions in which respondents were buying for the feeders on a 50¢ per cwt commission basis. Mr. Kienow, complainant's expert witness, testified that the commission is not separately stated, but, rather, is included as part of the delivered price, in about half the livestock transactions. He testified (Tr. 474-75, 482-84):
>
> A. I draw your attention to [CX 52,] page 1. It shows Calgary, 144 steers. It shows a weight, price per hundredweight that Donaldson invoiced Schaake. It is $61.14.
>
> Q. Is that $61.14?
>
> A. Excuse me. It is $64.14 per hundredweight [JO Ref. 4, pp. 40, 82]. The purchase amount including the expenses incidental to the purchase of those cattle should have been sixty-three -- let's see. Fifty cents less than that would be $63.74 [actually $63.64], if my math would be correct, would be the purchase amount; and the 50 cents a hundred commission would make the $64.14.
>
> Q. In your experience as an investigator and an assistant regional supervisor and also a regional supervisor in the various regions which you have testified you have administered, how common is it to have a commission transaction accounted for in this manner where the commission is not separately stated?
>
> A. It probably occurs 50 percent of the time.
>
> Q. Specifically with respect to your duties when you're in the Portland regional office, how common is it to have a commission transaction accounted for in this manner where the commission is not separately stated?
>
> A. It probably occurs 50 percent of the time.
>
> . . . .

Q. In these transactions that you have tabulated and included documentation for, who initially pays for the livestock being purchased?

A. Mike Donaldson.

Q. Then what is the payment that the buyers give to Donaldson? What would those payments include?

A. Those payments would include the amount that Mike paid to the person from whom he received the livestock, the freight, the tests, the incidental expenses, the duty.

. . . .

Q. When Mr. Donaldson receives those payments from the buyers, what should those payments include?

A. His commission.

Q. What else should they include?

A. The purchase price of the livestock and the expenses in getting those livestock from Canada into the U.S.

Q. Basically the items that you tabulated on your schedules?

A. That would be true.

Q. Those types of expenses?

A. That's true.

Similarly, Mr. Monson, who purchases livestock through about 10 to 12 commission buyers (Tr. 365-69), testified that the commission is a separate entry on the accountings on 50% or less of the accountings he receives. He testified (Tr. 383):

Q. For this next question I would like you to use the time frame of 1980 through the present time, if you are able to. My question to you is: when you purchase, you meaning Monson and Sons, Sam Cattle Company and your present farm, purchase livestock on a commission basis from an order buyer, how often is the commission a separate entry on the accountings which you receive?

A. Probably 50 percent or less.

Similarly, Mr. Schaake, who purchases livestock through about 10 to 12 commission buyers (Tr. 210-14), testified that there are various ways in which the commission is paid, and that a "big share of the time they are not" separately stated on the invoices (Tr. 268). He testified (Tr. 247-49, 250-51, 268-69):

Q. When you purchase livestock on a commission basis through these order buyers or agents, how often is the commission included in the price per hundred weight for the cattle in the accounting to you?

A. We do that various ways. We have a man who probably buys more cattle on that basis than anybody, Clarence Johnson. Clarence pays for the cattle with our draft. Once a month we pay him his commission. We keep track of the commissions as we go along. Once a month we pay him. Some of them -- I have one -- we have one that works out of Billings, Montana. He will pay for the cattle with our draft and he will draw another draft on us for his commission. If they use our draft to pay for the cattle, then, of course, they cannot add the commission to it because then that draft is going to the seller of the cattle.

Q. Where they are purchasing the livestock, where a commission agent is purchasing the livestock themselves and then collecting from you for both the purchase amount and his commission, how often would his commission be separately stated would you say?

A. Well, a lot of them do this: say this order buyer or commission buyer is buying the cattle and he paid 60 cents a pound for the steers so he paid the seller of the livestock 60 cents. When he draws a draft on us, he shows it at 60-1/2, which the commission is included. Now, he could have written down the cost of the cattle, plus commission 50 cents. It is done various ways, but we have one order buyer that does that. He just adds it to the price of the cattle. Mike is practically the only order buyer we purchase from that pays expenses. Within the States, the only expense you have on the cattle besides the cost of the cattle themselves is the freight. They do not have -- why pay the freight bills ourselves. Mike, most of the cattle he buys, it saves in our bookkeeping and our accounting, he pays the hauling. From California he will pay the hauling, then bill us at a price which includes his commission and the hauling.

Some order buyers purchase cattle at a salesyard for instance. They will have the salesyard add on the commission and then the salesyard will pay them. In other words, say that the commission came to $200 for the cattle that he bought. The salesyard will put on the commission because that way the order buyer gets his money immediately and it is done that way.

. . . .

Q. Where the order buyer is being paid by you for both the commission as well as the purchase amount which he has previously paid for livestock, could you give us a rough percentage of how often that commission would be separately stated on the account?

. . . .

A. You are talking about a transaction where the order buyer pays for the cattle with his own check?

Q. That is correct?

A. And draws a draft or we send him a check, our check for the cattle, including the commission.

Q. That is correct. And sometimes the freight.

Q. How often would the commission in that situation be separately stated on the accounting or billing to you?

A. As a separate figure. Some order buyers always show it separately, what the cattle cost plus the commission. Some order buyers include it. In other words, I know the cattle cost 60 cents, but on his when he shows us a figure it is shown as 60-1/2 which includes his commission. To me it is just a way -- it all amounts to the same -- it is just a way of putting it down on paper.

Q. Would you say 50 percent of the time it might be separately, say that 50 percent of the time it might be included?

A. I would say more often than not it is included in the figure when he draws our draft or we send him a check, his commission will be part -- in other words, if cattle cost 60 cents and 50 cents commission, most of the time the cattle will show on our record of costing 60-1/2 cents.

. . . .

Q. So there are other transactions outside of these in which the commissions are directly stated in some manner?

A. Well, a lot of times they are not stated on the documents. I would say a big share of the time they are not. Like I stated earlier, if a man buys cattle at 60 cents in Oregon, for instance, he will -- he pays for those cattle at 60 and I have to trust what he said he paid, 60, that he did pay 60 because we have no documents to back up what he paid. Then we'll pay him 60-1/2 or he will draw a draft on us for 60-1/2. Of course I know what I have paid for the cattle. I know what the commission is without him putting it down. On the second line, commission, 50 cents a hundredweight, "X" being amount of dollars.

Q. You would agree with me, though, there are other transactions in which the commission is specifically stated?

A. Yes.

Respondents' purported expert witness, Mr. Frye, recognized that commissions are paid in various ways, particularly in the case of small numbers and small dollars. He testified (Tr. 681-83):

JUDGE WEBER: Is it common that there are a variety of arrangements where there are commission deals, order buying, arrangements, that the commission is paid in a variety of different ways contingent upon the discussion of parties and the agreement of the parties with reference to it?

buyer purchasing the cattle for $62 at a market, but paying the market $62.50 for the cattle and the market then giving the check back to the order buyer for his 50 cents a head commission? That's one type. It has been described.

Another type is where the order buyer might purchase the cattle at a market and write a check or a draft for his own commission on his principal's check or draft. That is a second category. That has been described.

A third type of arrangement that has been described is where periodically the principal pays the order buyer for the number of cattle he has purchased during that particular period.

Are those types of arrangements common or unusual in your understanding, your view?

THE WITNESS: Sir, I would say those are common in small numbers and small dollars.

Mr. Kienow, Mr. Monson and Mr. Schaake, whose expertise was regarded by the ALJ as much greater than that of Mr. Frye (Initial Decision at 3), categorically stated that an order buyer's commission is not separately stated on the invoices in a great many cases, i.e., in about half of the livestock commission transactions. And they did not limit such a practice to transactions involving small numbers and small dollars. Hence the record here fully supports the conclusion that the fact that respondents' commission was not separately stated on the invoices to Schaake, Monson and Van de Graaf is not a circumstance detracting in the slightest from the strong evidence proving that the 17 transactions involved here were commission transactions.

Under the regulations, a commission buyer (market agency) is required to provide a written account showing, *inter alia*, "the commission and other lawful charges" (9 C.F.R. § 201.44 (1986)). Accordingly, every market agency buying livestock on commission in the United States should separately show his commission on the invoice. But, as shown above, that is not done in about half the transactions. In view of the small size of the Packers and Stockyards Administration's staff, and the enormity of its regulatory task, it is not likely that complainant will expend the necessary money and manpower to obtain compliance with this regulation in the foreseeable future.

There is no basis whatever for overturning the ALJ's findings and onclusions that the corporate respondent, through the activities of the ndividual respondents, held itself out as an agent, buying livestock as an order buyer for a 50¢ per cwt commission, in the transactions involved here (other han the single dealer transaction alleged in ¶ III of the complaint).

The numerous transactions where respondents admittedly increased prices more than the 50¢ per cwt commission need not be restated. Although there is no doubt from the testimony and case law that respondents were required, as agents, to pass on pencil shrink allowances to their principals, they admittedly did not do so in many transactions. Findings 8, 9, and 10 state the importance of passing along pencil shrink in livestock marketing. Supplemental to those findings, I believe it may be helpful to include a succinct statement of the law and decisions concerning pencil shrink, which vas recently restated in *In re White*, 47 Agric. Dec. ____, slip op. at 66, 70 Jan. 11, 1988), as follows:

[I]t is well-settled that where a person buys livestock on a commission basis for a principal (or sells livestock as a dealer on the dealer's purchase weights), failure to pass on to the principal (or to the buyer from the dealer) any pencil shrink received upon purchasing the livestock is unlawful.[5]

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[5] To illustrate a pencil-shrink transaction, a 1,000-pound animal purchased with 4% pencil shrink would be correctly weighed at 1,000 pounds, and the invoice would show a deduction of 40 pounds, so that the buyer would only pay for 960 pounds (see Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law* 231 (1981); *In re Saylor*, 44 Agric. Dec. 2238, 2460-64 (1985) (decision on remand)). If respondent had purchased hogs on a pencil shrink basis (which was not involved here), respondent would have been required to pass on the pencil shrink to Fineberg. See *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____ (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty), [*aff'd*, 841 F.2d 1451 (9th Cir. 1988)]; *In re Saylor*, 44 Agric. Dec. 2238, 2464 (1985) (decision on remand) (8-month suspension and $10,000 civil penalty); *In re Collier*, 38 Agric. Dec. 957, 967-68 (1979) (6-month suspension), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished).

The purchase of livestock on someone else's purchase weights is a well-recognized trade practice throughout the United States. No one involved in the livestock industry misunderstands this trade practice. Buying or selling on someone else's purchase weights means simply that you buy or sell on the same weights determined when he obtained the animals, whether those weights are accurate or inaccurate. As stated in *In re Collier*, 38 Agric. Dec. 957, 965-67 (1979) (6-month suspension), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished):

> Next, the Complaint charged respondents on four separate occasions between December 1974 and April 1976 with selling cattle at a falsely increased weight, or by failing to pass on the agreed shrinkage figure that respondents obtained when they purchased the cattle. One purchaser, a Nevada rancher, testified that he purchased the cattle from respondents in a telephone call on April 5, 1976.
>
> > ". . . I thought I was going to get the buying weights on these cattle I bought, I didn't know I didn't get them, as a matter of fact, until way later on when these guys came by and showed the pay weights on the cattle."
> > (Tr. page 50)
>
> His agreement with respondent was to pay "so much a pound delivered on the pay weight" (Tr. page 50). He was unaware that the weight figures provided to him by respondents were different from the weights that respondents purchased the cattle at.
>
> In testimony Mr. Thurber stated that "the weighing of cattle is a very variable thing, depending on the location of the ranch in regards to the scales, some cattle are in pens adjoining the scale and other cattle are driven to the scales and some are hauled. The weigh condition will vary depending on these circumstances, so it is an item that is negotiated with every

condition when buying the cattle, I expected Custom Made Feeding Company to receive [it]." (Tr. page 14).

Mr. Thurber in his affidavit in September 1975 said that "all feeder cattle purchased by Gallop Cattle Company for Custom Made Feeding Company is on the basis of Gallop Cattle Company purchase weights". (CX 18, page 2).

The exhibits show that respondents purchased cattle at particular weights, obtained an invoice from the seller showing that weight, provided a Bill of Sale Draft to the seller for the purchase payment showing that weight.

They also show that when those cattle were resold by respondents, without being weighed again, or were transferred to respondents' principal, that the weights used by respondents were fictitiously increased over respondents' purchase weights, or not all of the agreed shrink negotiated by respondents was passed on by respondents.

"A. Two of the allegations involved in the complaint allege that in purchases made on a commission basis for a client that--in one allegation, the prices were marked up so that the respondents took both a commission and a markup in price on the livestock, and that weights were not passed through on the basis of actual purchase weights. These types of practices are considered by the agency [Complainant] to be extremely serious practices in the purchase of livestock.

The livestock industry operates, to a major extent, on the basis of trust; at one time, a handshake; more so now than ever, on the basis of a telephone call, without even a face-to-face meeting. This basis of trust within the industry has allowed an orderly pattern of marketing to develop and to operate within the industry. Where this trust is violated, it interrupts this orderly marketing pattern and is a serious interruption to the continuation of an orderly marketing pattern.

Also, on this type of practice where livestock are bought on a commission basis, the buying agent or the person, with the order doing the buying, has a fiduciary responsibility to his principal, the responsibility to buy for that principal at the best possible price and at the best possible weighing conditions and to give to that principal whatever he is able to get the livestock purchased at, and he is to be reimbursed for his services on the basis of whatever the agreed commission is. He has the responsibility to pass on, both the price and the weight, at which he purchased the livestock, in an order buying transaction.

A violation of this is considered a very serious practice, by the agency [Complainant], because of the trust that exists and the fact that most of the industry operates without written contracts, but on a verbal basis; and, also, because any violation of this trust is dollars directly out of the principal's pocket, in payment for these extra charges.

BY MR. HEINZ:

Q. Mr. Davis, regarding dealer transactions, can you tell us whether or not it's the custom in the trade to pass on purchase weights?

A. Yes, it is, with this reservation. In inter-transactions [sic], livestock are frequently bought, in the country, with various degrees of pencil shrink. It is customary for cattle to be sold on the original purchase weights. By the original purchase weights, it is customary for them to be sold at the original purchase weight with whatever shrink was taken at the producer level being passed on to the next buyer.

The exception to that or the reservation to that would be if there is a specific understanding that the shrink may not be the same shrink at which the livestock was purchased; but absent that specific understanding, it is customary to talk in terms, to discuss original purchase weights, and that to mean that its original purchase weight including passing on the original shrink as well."

(Tr. pages 129-131)

See *In re Boone Livestock Company*, 27 AD 475 (1968) and *In re Arnold Fairbank d/b/a Arnold Fairbank Cattle Company*, 27 AD 1371 (1968), aff'd 9th Circuit, 29 AD 601 (1970) where adding arbitrary weight to the purchase weight was held to be an unfair and deceptive practice in violation of the Act. In *Boone*, at page 477, it was held that:

"At all times material herein, it was a well-established custom and practice in the livestock trade in Arizona and California, when buying feeder cattle from sellers who had purchased such cattle at other points, including the southeastern states and Texas, to buy said cattle on the basis of the weights at which the seller purchased them at such other points."

Further, in *Boone* at page 494, it was said that because of the

"prevailing custom, practice or 'usage of trade', no affirmative representation was needed to make Respondents' purchase weights a part or term of the contracts involved . . . On the contrary, it would be incumbent upon Respondent expressly to provide otherwise in its sales contracts with its customers. In other words, *Respondent had a duty to speak or to alter the prevailing custom by specific contract terms if it wished to sell the livestock involved at other than its purchase weights*. Rather than doing so, Respondent sold the cattle at other than its purchase weights without contracting to do so or informing its customers while aware that such customers assumed and believed that they were purchasing the livestock on the basis of Respondents' purchase weights."

(*In re Boone Livestock supra*, page 494, emphasis added)

[illegible] involved factual situations where respondent fictitiously increased the purchase weight, but neither involved a transaction wherein respondents purchased cattle with "pencil shrink" without passing the pencil shrink on when the cattle were to be resold at the purchase weights. 1/ Here,

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1/ "Pencil shrink" is used to compensate for the fill of the cattle at the time of weighing, and is negotiated at the time of the purchase, contingent upon "the weighing conditions of the cattle". (Tr. page 89)

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respondents in some of the transactions failed to pass on the "pencil shrink" or passed on only part of it, when the cattle were resold at purchase weights. Failure to pass on all of the "pencil shrink" when the cattle are resold on "purchase weights" has the same effect and impact as adding a fictitious number of pounds to the "purchase weights".

. . . .

The Packers and Stockyards Act cases referred to above, requiring an order buyer to pass on to his principal the exact "purchase weights," are consistent with the common law agency principle that, "[u]nless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal." Restatement (Second) of Agency § 388 (1958).[6]

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[6] *Accord Savage v. Mayer*, 33 Cal. 2d 548, 203 P.2d 9, 10 (1949).

It makes a stark comparison indeed to compare the foregoing to respondent Crowl's testimony, as follows (Tr. 410-11):

Q. Did you pass shrink, this transaction, Exhibit 2-B?

A. Which transaction are you --

Q. 2-B.

A. What page?

Q. Any page.

A. No, we do not.

Q. Why didn't you?

A. I guess we felt that the cattle didn't need it.

Q. Whose opinion were you relying on?

A. Mr. Barber's.

Q. Are you of the opinion that shrink should not have accompani e cattle?

A. I feel this way about shrink, if the shrink needs to accompa e cattle as you can see in some of our records of the company, if esn't, I believe that's our business.

Q. That's your sole and solitary opinion as a businessman?

A. That's my opinion as a Western States Cattle Company.

Q. Right. And that's the way you do business?

A Yes, it is

Q Some of your customers felt otherwise.

A I imagine they did

espondents' deceptive and unfair practices are squarely violativ (a) (7 U.S.C. § 213(a)). Moreover, respondents' violations wer on of their fiduciary obligations, and when a fiduciary violates his espect to prices or weights, the fiduciary defeats the primary purp : Act, which is to assure fair competition and fair trade practice ock marketing Moreover, there is no need to prove actual injur tory intent, when a fiduciary defrauds his principals with respect to pr ghts. These points and authorities were recently restated in *In re V it & Sons, Inc.*, 47 Agric. Dec. ____, slip op. at 30-36 (Apr. 29, 19:

II. The Law of Agency Is Routinely Applied within the Mandates, Purposes and Objectives of the Packers and Stockyards Act, Inter Alia, to Protect Farmers and Ranchers and to Ensure that They Do Not Receive Less than Full Value for Their Livestock.

Agency 2d is often cited in Packers and Stockyards Act proceedings sort through the behavior of livestock marketers, in the partment's continuing effort to protect farmers and ranchers and ure that they do not receive less than full value for their livestock *In re Spencer Livestock Commission Co.*, 46 Agric Dec. ____, slip op 38c (Mar. 19, 1987), *aff'd*, [841 F 2d 1451 (9th Cir 1988)], it is made ar that no other circumstances need be considered to determine ency, when there is an express agreement between two persons that e is to act as the agent of the other, as follows (emphasis added)

> Since I believe the testimony of the three feeder witnesses as to their agreement with Mike Donaldson, there is no need for me to consider other circumstances indicative of an agency relationship. That is, *if there is an express agreement between two persons that one is to act as the agent of the other, an agency relationship is formed*, and there is no need to consider whether other circumstances point in the direction of an agency relationship or a dealer transaction *Restatement (Second) of Agency*, § § 1, 14K, 15, 26 (1958).

The agency relationship, and its concomitant fiduciary duty, is the bedrock upon which the P&SA builds implementation of the clear will of Congress, expressed in the objectives of the Act, that farmers and ranchers not receive less than the true market value of their livestock. In *In re Welch*, 45 Agric. Dec. 1932, 1949-50 (1986), this extremely important objective of the Act is analyzed, and set forth with a poignant quotation from *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95, 102 (D. Minn. 1945) (3-judge court). These cases make it abundantly clear that Congress intended that a marketing agency maintain absolute loyalty to its shippers. Moreover, a marketing agency's sole objective should be *to sell at the highest price available* on an open, competitive market. It is clear that when the agency acquires an interest, other than agent, it no longer can honestly and efficiently represent the principal. The quotation in *Welch* reads as follows (*Welch*, *supra*, at 1949-50) (emphasis added):

> In the present case, the record supports the ALJ's finding that in a number of private treaty transactions, Michael Benson, in the course of his employment as a commission firm salesman, "sold consigned livestock to respondent Welch at substantially less than full market value of the livestock" (Initial Decision at 3). *That violated one of the main objectives of the Act, which "is to safeguard farmers and ranchers against receiving less than the true market value of their livestock"* (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 1 (1957), *reprinted in* [1958] U.S. Code Cong. & Ad. News 5212, 5213. *See Glover Livestock Comm'n Co., v. Hardin*, 454 F.2d 109, 113 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. U.S.D.A.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971).
>
> Even if there had been no proof that Benson sold consigned livestock to Welch at less than the full market value, or purchased livestock consigned by Welch at more than the full market value (to fill Benson's employer's purchase orders), *the mere fact that there was a transfer of funds from Welch to Benson in connection with transactions at the stockyard placed Benson in a conflict-of-interest situation, which is a very serious violation of the Act.* As stated in *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95, 102 (D. Minn. 1945) (3-judge court):
>
> > The producer consigns his livestock to a market agency to represent him as his agent and who is supposed to have no interest except the welfare of his principal. Accordingly, *the producer places his financial interests in the absolute control of his agent. Consequently, the success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value.* To say that much depends on the integrity and ethics of those engaged in marketing livestock is speaking mildly. Experience long ago taught that stockyards require some sort of supervision and Congress has lodged it in the Department of Agriculture under the Act of 1921, as amended, obviously because a major portion of the great agricultural industry of the country is vitally concerned.
>
> . . . .

> The methods of transacting business in the yards constantly are a temptation to collusion. Sales of livestock are made by negotiation and bargaining, and not at public auction. The purchaser is present; the shipper is not, but relies on his market agency. The agent is in closest contact with buyers for packers, with speculators and traders and perhaps has dealt with these same persons for many years; so, in accordance with human instincts, ways and means are found to profit at the expense of the absent member to the transaction. *A marketing agency should maintain a position at all times which would assure absolute loyalty to its shippers.* No interest should be allowed to interfere between the agent and his principal. When an agency receives a consignment of livestock, *the sole objective should be to sell it at the highest price obtainable on an open, competitive market. When the agency acquires an interest, other than agent, it no longer can honestly and efficiently represent the principal.*

A commission firm employee is in a fiduciary relationship to the firm's principals, and owes the highest degree of loyalty to the firm's principals.[7] Respondent Michael Benson engaged in a very serious violation by entering into an arrangement with Doug Welch that necessarily and inherently created a conflict-of-interest situation.

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[7] *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 94-102 (D. Minn. 1945) (3-judge court); *In re Saylor*, 44 Agric. Dec. [2238, 2395 (1985)] (decision on remand); *In re Bosma*, 41 Agric. Dec. 1742, 1744, 1751-54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984); *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 211-12 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 829 (1979).

Moreover, in the *Spencer* decision, it is emphasized that when a fiduciary violates his duty with respect to prices, the fiduciary defeats the primary purpose of the Act. *Spencer* states (*Spencer*, *supra*, slip op. at 198-200) (additional emphasis added):

> Respondents waste five pages of their brief on appeal (10% of the brief) arguing the absurd proposition that even if respondents violated the Act as found by the ALJ, nonetheless, the violations were not serious because the Act is concerned only with safeguarding sellers, protecting consumers, and protecting the industry from unfair practices *of competitors* (Appeal Brief at 38-43). In support of their argument, respondents quote two sentences from the legislative history of the 1958 amendments to the Act. However, the sentence immediately preceding that quoted by respondents destroys respondents' argument. The legislative history relied on by respondents, including the first two sentences of the paragraph omitted by respondents, is as follows (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 1 (1957), *reprinted in* 1958 U.S. Code Cong. & Ad. News 5212, 5213; emphasis supplied):

PRINCIPAL PROVISIONS OF THE ACT

> The Packers and Stockyards Act was enacted by Congress in 1921. *The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing* and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.

Hence the "primary purpose" of the Act is to assure not only fair competition, but, also, "fair trade practices in livestock marketing" and meat packing. Accordingly, *when a fiduciary buying livestock on a commission basis defrauds his principals with respect to prices and weights, the violations defeat the "primary purpose" of the Act.*[53]

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[53] Although some cases hold that certain types of violations of the Act require proof of predatory intent or proof that the practice is likely to result in injury to competition (e.g., *Armour & Co. v. United States*, 402 F.2d 712, 712-23 (7th Cir. 1968)), other cases recognize that other types of violations require no such proof (e.g., *Bosma v. USDA*, 754 F.2d 804, 809 (9th Cir. 1984) (failure of auction operator to inform consignors that he was the actual purchaser of their livestock is "inherently unfair," and "it may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm"); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1469-70 (NDNY 1984) (§ 202(a) of the Act prohibiting "unfair" or "deceptive" practices by packers does not require proof of injury to competition; it is sufficient to show that cattle were short weighed); *In re Corn State Meat Co.*, 45 Agric. Dec. [995, 1019-28 (1986)]; *In re ITT Continental Baking Co.*, 44 Agric. Dec. [748, 781-83 (1985)] (remand order), *final order*, 44 Agric. Dec. [1971 (1985)] (consent order); *In re Farrow*, 42 Agric. Dec. 1397, 1422-29 (1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits affirmed; suspension order reversed).

The broad scope of the Packers and Stockyards Act was recognized in 1921 as follows (H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921)):

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial [sic], supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

Furthermore, Congress has repeatedly broadened the Secretary's regulatory authority under the Act. In 1924, the Act was broadened to authorize the Secretary to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460, codified at 7 U.S.C. § 204). The Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649, codified at 7 U.S.C. §§ 192, 218b, 221, 223). In 1958, the Act was broadened to give the Secretary "jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size" (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 5 (1957), *reprinted in* 1958 U.S. Code Cong. & Ad. News 5212, 5216). In 1976, the Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary prove that each violation occurred "in commerce" (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

From the foregoing, it is clear that Congress has, over the years, recognized the need to assure fair trade practices in the livestock marketing industry in view of the nature of the industry and its importance to the national economy. *Any commission buyer who defrauds principals in fiduciary transactions has committed one of the most serious violations that can be committed under the Act.*

In a very recent affirmation of these points and authorities, the Ninth Circuit specifically affirmed *Spencer's* interpretation of the Act, clarifying fiduciaries' responsibilities to principals, and affirming fair trade practices as the primary purpose of the Act, as follows (*Spencer Livestock Commission Co. v. Department of Agriculture*, [841 F.2d 1451, 1454-55 (9th Cir. 1988))]:

Petitioners maintain that the ALJ erred in finding their conduct illegal under § 213 because their conduct did not threaten any of the interests the Act seeks to protect. They identify these interests as safeguarding sellers, protecting consumers, and protecting the industry from unfair practices of competitors. Petitioners stress "of competitors" as though the Act were nothing more than a mirror of the antitrust laws. They argue that since in none of the 17 transactions did the sales price exceed the prevailing market price, there was neither harm nor threat of harm to consumers.

The JO rejected this line of argument by finding that "[e]ven if true, that fact would be irrelevant. An agent who secretly increases the weights and prices of livestock purchased on a commission basis for principals commits very serious violations of the Act even if the invoice prices to the principals are at or below the market." We rejected a similar argument in *Bosma*, where we found an average profit of $100 per head "sufficient evidence to support the J.O.'s conclusion that Bosma did not pay his consignors a fair price, regardless of whether they were satisfied with what they got." *Bosma*, 754 F.2d at 809.

> Petitioners further characterize the feeders' belief that they were operating on commission as a "misconception," and assert that in the absence of proof of an anti-competitive effect, the Department should leave feeders to protect themselves against such "misconceptions" by insisting on written contracts.
>
> This argument relies on an incomplete understanding of the objectives of the Act. The primary purpose of the Act was "to assure fair competition and *fair trade practices* in livestock marketing. . . ." H.R. Rep. No. 1048, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 5212, 5213 (emphasis added). It was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics. Thus, under the *Central Coast* rule, we uphold a finding of a § 213 violation where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors.
>
> Petitioners *plainly* practiced deception. . . .

For all the foregoing reasons, Issue II presents no meritorious argument and is rejected. However, even if I had disagreed with the ALJ's findings and conclusions that respondent Western States Cattle Company acted as an agent, *viz.*, a market agency, in the transactions discussed above (except as to ¶ III of the complaint, discussed in Finding 27), I would have imposed the same sanction. That is, even if respondent Western States Cattle Company had been acting as a dealer, respondents' activities in misleading the purchasers into believing that Western States Cattle Company was buying for them as an agent on a 50¢ per cwt commission basis would have been such unfair and deceptive practices as to warrant the same sanction imposed for the market agency violations found here.

Respondents' third argument is stated, as follows:

Issue III

> Section 27 of the findings of fact submitted by the Respondents [sic] adopted by the Administrative Law Judge is one transaction out of the hundreds reviewed by the Complaint's [sic] investigators which actually revealed a weight discrepancy of some 330 pounds in a 48,000 pound transaction. One transaction in hundreds cannot be a basis for a determination by the Administrative Law Judge that the corporate respondent charged the purchaser and collected from it on the basis of the false and incorrect weight and prepared or caused to prepare [sic] false records including false sales invoices showing the fraudulently increased sales weight. This finding is erroneous.

Respondent does not deny the above discrepancy of 330 pounds, but ascribes it to an inadvertent clerical error. Moreover, respondents argue that, in any event, the discrepancy is *de minimis*, not shown to be a common practice, and cannot thus support any sanction beyond a letter of warning or reprimand. Respondents argue that no suspension or cease and desist order could be based upon this isolated violation.

Respondents put on no proof to support their claim of clerical error. On the other hand, complainant's witness Edwards, who investigated this charge, testified that he did not believe it to be a clerical error. In fact, the discrepancy comes out to be exactly a 4-pound-per-head gain, rounded to the nearest 5-pound increment (livestock is customarily weighed to the nearest 5-pound increment), and there is none of the usual evidence to support a clerical error. Mr. Edwards testified, as follows (Tr. 315-16):

Q. (By Mr. Becker) Mr. Edwards, do you think or do you notice that there has been a weight increase to the buyer of the cattle with respect to this transaction?

A. Yes, sir.

Q. Do you consider that to be an inadvertent clerical error?

A. No, sir.

Q. Why not?

A. If it was an inadvertent clerical error you would be able to see if the decimal point had been moved over, if there had been a transcription of figures, or if the figures had been transposed. But in this particular case that's not apparent. Also, additionally if you take the number of head times four pounds, you come within very close to this figure.

Q. What is the amount of weight difference?

A. 330 pounds.

Q. That's the weight difference that's shown.

A. Yes, sir.

Q. And what would that be, would that be -- strike that?

Could you relate the 330 pound weight difference to anything in your experience in the cattle industry, sir?

A. The relation that I could make is if you take four times the number of head, would come very close to this figure and then it's adjusted back to whatever a scale ticket would print out, either fives or zeros.

The ALJ determined that witness Edwards' testimony was the more credible, and I agree. Thus, I find that there was a false weighing (and false records) violation here, and not an inadvertent clerical error.

There remains the respondents' argument that one "isolated" transaction in hundreds cannot support the proposed sanctions, and, within this argument, there was no "practice" of false weighing such that a minor discrepancy is *de minimis*, necessitating only a letter of warning or reprimand.

On the contrary, even slight false weighing has been consistently held to be a serious violation of the Act, and even one false weighing violation can be considered a "practice." These two issues were recently addressed in *In re White*, 47 Agric. Dec. ___, slip op. at 89-90, 102-03, 106-07 (Jan. 11, 1988), *appeal docketed*, No. 88-3144 (6th Cir. Feb. 22, 1988) (the amount of discrepancy in *White* is coincidentally about the same as here), as follows:

Respondent's paragraph II arguments have been considered thoroughly, and are hereby rejected. I find the ALJ's decision on paragraph II correct, and it is adopted in its entirety.[10]

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[10] Respondent's false weighing involved in paragraph II involves three separate instances of false weighing. But even if they were regarded as one violation, a single violation may be an unfair and deceptive "practice," in violation of section 312(a) of the Act, because the "word 'practice' is used in a general sense, that is, as applied to the regulated industry and does not require that the respondent in an individual case indulge in the activity long enough and often enough to amount to a course of conduct on his part." *Rielly v. Steele-Siman & Co.*, 11 Agric. Dec. 584, 589 (1952). *Accord Swift & Co. v. United States*, 317 F.2d 53, 55-56 (7th Cir. 1963); *Rowse v. Platte Valley Livestock, Inc.*, 597 F. Supp. 1055, 1056-61 (D. Neb. 1984); *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Neb. 382, 315 N.W.2d 229, 230-35 (1982); *Neugebauer v. Ryken*, Civ. 74-4018 (S.D.S.D. Sept. 30, 1975), *printed in* 34 Agric. Dec. 1712, 1715-18 (1975); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 563-64 (1977), *aff'd sub nom Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *Northwest Cattle Co. v. Iowa City Sales Co.*, 14 Agric. Dec. 276, 279-80 (1955); *Hughes v. Perry*, 1 Agric. Dec. 235, 236-40 (1942). *Cf. Ex parte Delaney*, 43 Cal. 478, 479-80 (1872); *State v. Randall*, 248 S.W.2d 860, 863 (Mo. 1952); *State v. Keet*, 269 Mo. 206, 190 S.W. 573, 574-76 (1916); and *Annot., License--Single Transaction*, 93 A.L.R.2d 90, 99-100 (1964) (all involving other statutory and constitutional language in which a single act was held to constitute a practice).

. . . .

With respect to respondent's false weighing involved in paragraph II of the complaint, short-weighing Mr. Kelley by 435 pounds on a single truckload of hogs is an enormous violation! In the typical false-weighing case, where the Packers and Stockyards Administration check-weighs livestock at an auction market, the amount of short weighing on each draft is from 5 to 20 pounds *(see e.g., In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1813 (1975)). In such cases, although excuses are seldom accepted, the respondents at least have the opportunity to argue that they were merely careless, or that there was a scale malfunction. But where, as here, respondent short-weighs three drafts of hogs by a total of 435 pounds, no excuses can be offered. That shows deliberate misconduct.

In fact, respondent does not even attempt to offer any excuse for a 435-pound error. He contends, instead, that he never gave Mr. Kelley the original set of scale tickets that show the 435-pound short-weighing. But since that issue has been resolved against respondent, with good reason, his short-weighing the single truckload of hogs by 435 pounds must be regarded as a most flagrant violation.

In order to understand the seriousness of the violation, some context should be given to the practice of false weighing in the hog industry. Not only is false weighing extremely difficult for the producer to detect, there is a built-in predisposition on the part of the packer (buyer) to accept favorable (other than accurate) weights, because of the packer's emphasis on yield.

Thus, there is a great tendency on the part of the auction house to false weigh, shorting producers, while, at the same time, giving packers (buyers) *more* than accurate weights. In so doing, the auction house is able to eliminate the shrink to the packer (buyer). Short weighing is an unfair and deceptive practice, harming competing markets by taking potential sellers from them, depriving sellers of their correct full payment for their livestock, inducing packers to pay more per pound or not deduct for shrinkage (due to higher yields on short-weighed livestock), and helping to perpetuate the auction house in business.

In fact, even slight false weighing is a serious violation of the Act, is one of the most deceptive practices under the Act, and is virulently anti-competitive. These principles were recently restated in *In re Parchman*, 46 Agric. Dec. (May 28, 1987), *appeal docketed*, No. 87-3701 (6th Cir. July 23, 1987).

. . . .

Considering the creation of a false set of scale tickets involved in paragraph III of the complaint, this would be a serious unfair and deceptive practice, even standing alone. But the violation is much more serious when viewed in the light of the short weighing involved in the same transaction (¶ II), and when viewed in the light of the total picture involved in the paragraph II, III and IV violations. The proof, considered as a whole, shows that respondent, on a regular basis, purchased hogs on a commission basis for Fineberg Packing Company on the basis of respondent's purchase weights, but charged Fineberg an arbitrary number of pounds greater than respondent's purchase weights, contrary to the fiduciary arrangement between respondent and Fineberg. The short weighing of Mr. Kelley's hogs by 435 pounds (¶ II) is obviously part of the overall picture, as is the creation of a second set of scale tickets (¶ III) in the identical transaction, that would form the basis for charging Fineberg for greater weights than respondent's purchase weights (¶ IV).

Finally, the paragraph IV violations, in which respondent charged and collected from Fineberg on the basis of weights which were frequently 300 to 600 pounds more than respondent's purchase weights in the same transactions, contrary to a fiduciary agreement, constitute exceptionally flagrant violations. *In re Collier*, 38 Agric. Dec. 957, 965-67 (1979) (6-month suspension), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished). (Since *Collier* was decided in 1979, sanctions under the Packers and Stockyards Act have been significantly increased (see the quote from *Spencer, supra*.))

Consequently, the usage of the term "practice" in § 312(a) of the Act (7 U.S.C. § 213(a)) is dissimilar from respondents' argument. This violation is deemed a practice. Moreover, even slight false weighing or invoicing on false weights is a serious violation. Thus, the arguments in Issue III are rejected.

Respondents' fourth argument is summarized by respondents, as follows:

Issue IV

The finding that the corporate respondent and through it the respondents Crowl and DeHaan failed to maintain and keep records that disclosed the transaction is totally without basis.

Respondents make two basic points, first, that the respondents' records were complete and openly informative of the transactions being investigated (including the pencil shrink violations) and, second, that weight tickets were not physically made available to respondents at the respondents' purchase locations. Consequently, Finding 10 should be deleted.

These arguments are not meritorious. Moreover, I totally agree with complainant's reply to Issue IV (Complainant's Reply to Respondents' Appeal at 8-9, Dec. 15, 1986) in that a complete set of records which reflects false information is still a violation. Also, on the second point, the regulations require weight tickets to be maintained regardless of the inconvenience of respondents. In country transactions, a notebook recitation of weights has sometimes been accepted by P&S in the past. But, respondents did not even have this rudimentary information.

The arguments in Issue IV are rejected. Furthermore, since false weights always involve recordkeeping violations, in addition to trade practice violations, and the violations are intertwined, any suspension order is based on the trade practice violations only. *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515 (1974), *aff'd mem.*, 510 F.2d 966 (4th Cir. 1975).

Respondents' final argument is stated, as follows:

> Issue V
>
> Disclosure of records by the investigators of the complainant in violation of Section 201.96 of the regulations and statements of general policy issued under Packers and Stockyards Act were the only basis upon which the complainant could induce their industry witnesses to testify which makes said testimony inadmissible or at the very least prejudiced.

Respondents' argument under Issue V includes much extraneous information not in the record before me, which information could not, in any event, form the basis for a finding of inadmissibility of testimony, or other evidence. I agree with complainant's views expressed in Complainant's Reply Brief, at 4-5 (Sept. 25, 1986), which states:

> Complainant need not defend the bald and undeveloped argument of respondents as regards the Fourth and Fifth Amendments. However, to the extent it can be helpful in this vacuum, it wishes to point out to this tribunal that corporations and their employees are not protected by these amendments from making corporate records available to appropriate governmental authority. By law the Packers and Stockyards Administration has access to such documents. (7 U.S.C. § 221) It also has the authority to carry on investigations to determine whether a dealer or market agency has violated the Act. (7 U.S.C. § § 212, 213(b)) A necessary aspect of such investigatory power is the right to disclose to appropriate persons during the course of an investigation pertinent documents of the investigated party so as to ascertain what happened. To hold otherwise would create a situation in which investigations would be incomplete because of the shackles the investigator would wear.
>
> The evidence in this proceeding is scant as regards documents secured from the corporate respondent which were shown to its customers. With respect to S.L.S. Farms there is no evidence that any documents were shown except perhaps in preparation for hearing. As regards Clarence and Francis Kenkel, the evidence shows they were shown invoices of the corporate respondent pertaining to transactions each had with the corporate respondent, and no other documents. (TR 81-82, 134-36) The Kenkels already had many of the documents shown

because some were invoices sent to them by the corporate respondent. Such showing was totally reasonable in the course of the investigation, and does not violate 9 C.F.R. § 201.96. To the extent the witnesses did not have them investigators had the authority to divulge them because such showing is otherwise required by law for them to carry out their investigative duties.

Furthermore, respondents' contention that complainant would not have procured the testimony of the Kenkel brothers without showing them copies of respondents' records is unsound since the Kenkel brothers appeared under subpoena ad testificandum (Tr. 59, 138).

Respondents' Issue V is without merit, and is rejected.

All of respondents' arguments raised on appeal have been considered and found not meritorious. To the extent that any of respondents' arguments have not been specifically mentioned herein, they have nonetheless been weighed against the evidence of record and are also rejected.

In the likelihood that a court will review this proceeding, two additional matters require discussion. First, there has been a recent tendency on the part of some sanctioned respondents to appeal 7 U.S.C. § 204 suspensions arguing that the required factors for civil penalties under 7 U.S.C. § 213(b) have not been considered by the ALJ or the Judicial Officer. The court in *Spencer Livestock Commission Co. v. Department of Agriculture*, 841 F.2d 1451, 1457 (9th Cir. 1988), rejected this argument as follows:

2. Factors Considered Under § 213(b)

Petitioners contend that factors the statute mandates the ALJ and JO to consider preclude the imposition of a 10-year suspension. Section 213(b) requires the Secretary, before assessing *monetary* penalties, to consider "the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business." 7 U.S.C. § 213(b). Section 204, which permits the Secretary to *suspend* a registrant "for a reasonable specified period," contains no parallel provision. 7 U.S.C. § 204.

Nonetheless, petitioners argue that it is reasonable to read the § 213(b) factors into § 204, since "it does not appear to be the congressional intent to permit a sanction which has the effect of completely and permanently excluding a person from the livestock marketing industry." Brief of Petitioner at 29.

Petitioners cite no authority for this contention, nor is there any. A more reasonable reading than that advanced by petitioner is that since Congress chose to include the language in one provision and omit it from the other, it did not require the factors to be considered as to the latter. [Footnote omitted.]

Thus, 7 U.S.C. § 213(b) factors are not to be considered in a 7 U.S.C. § 204 suspension. And, by extension, they would not be applicable to an order prohibiting the individual respondents from operating subject to the Act for a period of 6 months.

The sanction in the *Welch* case, concerning respondent Benson, was seized upon by the ALJ (*supra*, at 6) as the appropriate case governing the facts herein. I agree and the individual respondents are found unfit to operate subject to the Act for a period of 6 months. Thus, the order in this case as to respondents Crowl, DeHaan and Brown will be patterned after the Benson order.

Second, the 6-month suspension and prohibition provisions are consistent with the Department's sanction policy for Packers and Stockyards Act violations. As noted under Issue II in my additional conclusions, violations of a fiduciary duty are regarded as particularly serious violations of the Act.[3] This was emphasized in *In re Harry Klein Produce Corp.*, 46 Agric. Dec. ____, slip op. at 56-57 (Feb. 6, 1987), quoting from *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732-33 (1978), which, in turn, is quoting from *In re Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 695-96, 701 (1965), *aff'd sub nom. Mandell, Spector, Rudolph Co. v. United States*, 364 F.2d 889 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967):

> In addition, respondent was operating as a commission merchant or factor in consignment transactions and as a joint venturer in the joint account transaction, in both of which capacities respondent had a *fiduciary* duty to account truly and correctly, to keep adequate and accurate records identifying individual shipments of produce, to remit funds owing and not to commingle the goods of its principals or partners with its own or that of others. It is axiomatic that in this position of trust and confidence discrepancies or confusions created by respondent are to be resolved against it. * * *
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> * * *
>
> In determining the sanction to be imposed herein, it must be kept in mind that the major violations of the act found herein, that is, the violations of section 2(4) thereof, are, in our opinion, the most serious and flagrant type possible under the act. Such violations involve breaches of fiduciary duty by an agent to his principal and by a joint account partner to his joint venturer. The relationship of respondent to the shippers here was one of trust and confidence calling for a high degree of care, honesty and loyalty to the consignors and joint venturers.

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[3] *In re Rodman*, 47 Agric. Dec. ____, slip op. at 61 (May 27, 1988); *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 210-11 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir 1988), *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 94-102 (D. Minn. 1945) (3-judge court); *In re Welch*, 45 Agric Dec. 1932, 1949-50 (1986); *In re Saylor*, 44 Agric. Dec. 2238, 2395 (1985) (decision on remand); *In re Bosma*, 41 Agric. Dec. 1742, 1744, 1751-54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984); *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 211-12 (1980), *appeal dismissed*, No 80-1293 (10th Cir. Aug. 11, 1980); *In re Collier*, 38 Agric. Dec. 957 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re* Z. Lancaster Stock Yards, Inc., 28 Agric.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g., In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 213-51 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), which is set forth as an Appendix to this decision.[4]

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, *e.g., In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. ____ (Aug. 13, 1987) (1-year suspension for custodial account violations and various fraudulent activities); *In re Parchman*, 46 Agric. Dec. ____ (May 28, 1987) (90-day suspension and $10,000 civil penalty for weighing violations), *appeal docketed*, No. 87-3701 (6th Cir. July 23, 1987); *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. ____ (Apr. 13, 1987) ($50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____ (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty for increasing prices and weights in commission purchases), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *In re Welch*, 45 Agric. Dec. 1932 (1986) (decision as to Benson) ($10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act for fraud by an auction market employee); *In re Garver*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 (6th Cir. 1988) (unpublished); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) ($50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) ($50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for custodial account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out of consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985)

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[4]Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric Dec. 590 (1986), *aff'd*, 810 F 2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F 2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No 78-3134 (D N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980), *In re Muehlenthaler*, 37 Agric. Dec 313, 330-32, 337-52, *aff'd mem*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc*, 37 Agric. Dec 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F 2d 701 (8th Cir. 1978), *In re Cordele Livestock Co*, 36 Agric. Dec 1114, 1133-34 (1977), *aff'd per curiam*, 575 F 2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert denied*, 435 U S. 968 (1978), *In re Catanzaro*, 35 Agric Dec 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar 9, 1977), *printed in* 36 Agric Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric Dec 773, 796, 801 (1975), *aff'd*, 540 F 2d 518 (1st Cir 1976); *In re M & H. Produce Co*, 34 Agric Dec. 700, 750, 762 (1975), *aff'd*, 549 F 2d 830 (D.C Cir) (unpublished), *cert. denied*, 434 U.S 920 (1977); *In re Southwest Produce, Inc*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975), *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir 1975), *In re Marvin Tragash Co.*, 33 Agric Dec. 1884, 1913-14 (1974), *aff'd*, 524 F 2d 1255 (5th Cir 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. [illegible] (1974) *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re*

... [illegible] (6-month suspension and $10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) ($10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 44 Agric. Dec. ___ (Mar. 7, 1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. 1220 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984) ($77,000 civil penalty, with $27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983) ($20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

In *In re Garver, supra*, 45 Agric. Dec. 1090, 1101-04 (1986), it is explained that 2- to 5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30- to 60-day suspension orders would have been issued in comparable cases a few years ago.

Although there is no excuse for respondents to have been ignorant of the regulatory requirements applicable to their livestock transactions (one who voluntarily chooses to engage in a highly regulated business must inform himself of all regulatory requirements, or suffer the consequences), even if they were, it has never been the policy of this Department to limit severe sanctions to the case of intentional violations, or to violations done with knowledge of their unlawfulness. *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). I do not recall any contested case where a respondent has admitted that he knew that he was violating the law. Frequently, I infer that certain conduct was intentional and done with knowledge of unlawfulness (which is done for the benefit of reviewing judges who may dislike my hard-nosed sanction policy), but the sanction would be the same irrespective of those circumstances. *In re Worsley*, 33 Agric. dec. 1547, 1556-71 (1974). In *In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1891 and n. 15 (1984), it is explained that "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act" because:

> If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation.

For the foregoing reasons, the following order should be issued.[5]

Order

Respondent Western States, its successors, officers, directors, agents and employees, directly or through any corporate or other device, and respondents Tom Crowl and Gary D. DeHaan, their agents or employees, directly or through any corporate device, shall cease and desist from:

1. Engaging in any act, practice or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses, or which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;

2. Entering into, continuing in, or cooperating in any agreement, arrangement, understanding or course of business with any person for the

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[5]This is one of a group of cases that has been unreasonably delayed in the Office of the Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer [illegible] of budgetary constraints [illegible]

purpose of aiding or assisting such person to obtain money from the purchasers of livestock by false or deceptive pretenses, or which enables such person to engage in a practice which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;

3. Misrepresenting to their principals or to other purchasers of livestock or aiding and assisting any person to misrepresent to such persons, the original purchase prices or the original purchase weights of livestock, or the true nature of charges made for their buying services;

4. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, scale tickets or any other documents showing false, inaccurate, or misleading weight or price entries for such livestock;

5. Inserting or failing to insert in accounts of purchase, invoices, billings or any other document prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole, or in part, in a false, inaccurate or misleading record of such livestock purchase or sale transaction;

6. Collecting payment from the purchasers of livestock, or aiding and assisting any person to collect from the purchasers of livestock, on the basis of false, inaccurate, or misleading accounts of purchase, invoices or billings; and

7. Misrepresenting to buyers of livestock the terms and conditions under which livestock are being sold to them.

Respondents Western States Cattle Co., Crowl and DeHaan shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including accountings, invoices, billings and scale tickets which show the true and correct weights, prices, and shrinkage allowances of livestock.

The corporate respondent and its alter egos, Crowl and DeHaan, are suspended as registrants under the Act for a period of 6 months.

Respondent Brown, his agents or employees, directly or through any corporate or other device, shall cease and desist from misrepresenting to customers the terms and conditions under which cattle are being sold to them or bought for them.

Respondents Crowl, DeHaan and Brown shall not be registered to engage in business as a dealer or market agency for a period of 6 months. Pursuant to § 303 of the Act (7 U.S.C. § 203) and § 201.10 of the regulations (9 C.F.R. § 201.10), respondents Crowl, DeHaan and Brown are found to be unfit to engage in business subject to the Packers and Stockyards Act and shall not engage in business or operate subject to the Act as a market agency, buying and selling livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying and selling livestock in commerce, either on their own account or as the employee or agent of the vendor or purchaser, for a period of 6 months.

The cease and desist provisions of this order shall become effective on the day after service of this order. The 6-month suspension and prohibitions shall become effective on the 30th day after service of this order.

APPENDIX

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 213-51 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

U.S.D.A. Sanction Policy

[Excerpt omitted.--Editor.]

In re: WILSON & COMPANY, INC., and DAVIDSON MEAT COMPANY.
P&S Docket No. 2280.
Order filed June 8, 1988.

Kenneth Vail, for Complainant.
Darren B Anderson, Oklahoma City, Oklahoma, and Howard Adler, Jr., Washington, D.C., for Respondent.
Order issued by Donald A Campbell, Judicial Officer.

Termination of Order

Upon motion of the Packers and Stockyards Administration, the order in this proceeding is hereby terminated.

In re: WILSON and CO., INC., (WILSON FOODS CORPORATION).
P&S Docket No. 5160.
Amended Order filed June 13, 1988.

Kenneth Vail, for Complainant.
Darren B Anderson, Oklahoma City, Oklahoma, and Howard Adler, Jr., Washington, D.C., for Respondent
Amended Order issued by Victor W. Palmer, Administrative Law Judge.

AMENDED ORDER

Upon motion of complainant, and for good cause, the order previously issued in this proceeding is modified as follows:

ORDER

Respondent Wilson and Co., Inc., (Wilson Foods Corporation), its officers, directors, agents, employees, successors and assignees, directly or indirectly through any corporate or other device, in connection with its operations as a packer within the meaning of that term as defined in the Packers and Stockyards Act, shall cease and desist from giving, offering to give, or permitting or causing to be given, in connection with sales of meat and meat food products in commerce, any gift of more than nominal value of money or property to, or for the benefit of, any officer, agent or employee of any customer or prospective customer as a means of acquiring, maintaining or expanding an account with a customer: Provided that this provision shall not be deemed to prohibit respondent from engaging in or sponsoring bona fide sales promotion programs involving the award of gifts to employees of respondent's customers, where such programs are conducted with the knowledge of such customers.

Respondent shall keep accounts, records and memoranda which fully and correctly disclose and account for all transactions involving the giving of gifts to any such officer, agent or employee [illegible]

packer.

In addition to any and all other rights respondent may have to obtain modification or termination of this order which has been designed to enjoin the practices set forth in the amended complaint, this order shall be modified upon application by respondent to the Secretary of Agriculture at any time after the expiration of one year from the effective date hereof, to eliminate any stricture, limitation, or requirement herein contained which is not then enforceable or which by reason of any final court or agency decision, or change of policy, or failure to adhere to any policy, under the Packers and Stockyards Act, is not being enforced as to any similar activity and conduct of other packer(s) subject to the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act, 1921, as amended.

The provisions of this Amended Order shall become effective on the first day after service upon respondent Wilson and Co., Inc. (Wilson Foods Corporation).

Copies of this Amended Order shall be served upon the parties.

In re: WINCHESTER FOODS, INC., and LEE R. COX.
P&S Docket No. 6799.
Decision and Order filed May 11, 1988.

Fraudulent sale of meat - Misrepresentation - Failure to file answer.

Allan Kahan, for Complainant.
Respondent, pro se.
Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO WINCHESTER FOODS INC., UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondent Winchester Foods, Inc., has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, as they pertain to respondent Winchester Foods, Inc., which are admitted by respondent Winchester Foods, Inc.'s failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Winchester Foods, Inc., hereinafter referred to as the corporate respondent, was a corporation organized and operating in the State of Kansas. Its business mailing address was 521 S. Main Street, Hutchinson, Kansas 67504.

(b) The corporate respondent was, at all times material herein:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter, and manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of the Act and subject to the provisions of the Act.

2. Respondent Winchester Foods, in connection with its operations as a packer, engaged in unfair and deceptive trade practices, in that from the period November 4, 1984, through March 23, 1985, in more than five hundred (500) transactions during that period, including the transactions set forth in paragraph II of the Complaint and Notice of Hearing, said respondent fraudulently sold and delivered both fresh and frozen meat which was purported and represented to be boneless bull meat when, in fact, such meat was not boneless bull meat, but rather, a combination of boneless bull and cow meat.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent Winchester Foods, Inc., has wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)).

Order

Respondents Winchester Foods, Inc., its agents and employees, directly or through any corporate or other device, in connection with its business as a packer subject to the Act, shall cease and desist from:

1. Misrepesenting the origin, quality, sex, species or variety of meat sold; and

2 Using initials, symbols or other markings on boxes or packaging materials which does not accurately and fully indicate the contents of the box or package.

Respondent Winchester Foods, Inc., shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its operations subject to the Packers and Stockyards Act, including but not limited to account of sale showing the true and accurate origin, quality, sex, species or variety of meat sold.

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This decision and order became final June 24, 1988.-Editor]

LAWRENCE P. BRINCKS v. CARROLL LIVESTOCK MARKET, INC.
P&S Docket No. 6747.
Order of Dismissal issued June 16, 1988.

Complainant, pro se.
William P. Polking, Carroll, Iowa, for respondent.
Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, 7 USC 181 *et seq.*, begun by a complaint received on June 26, 1986, alleging in substance market agency failure to weigh accurately livestock sold to complainant at auction on a weight basis. The amount claimed was $556.00.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding under the Rules of Practice, were served on respondent on July 25, 1986. A copy of the investigation report was served on complainant on July 24. An answer and request for oral hearing was received from respondent timely. A copy thereof was served on complainant on August 13.

A written hearing was held by consent of the parties in view of the amount involved, notwithstanding the request for oral hearing. The amendment to the Rules of Practice setting a minimum amount for oral hearing was not applicable to this case because of its date of effectiveness. Complainant was not represented by counsel. Respondent was represented by Mr. William G. Polking, Attorney at Law, of Carroll, Iowa. Evidence was received only from respondent. No brief was received.

Complainant purchased cattle on a weight basis at respondent's auction on the afternoon of March 31, 1986. It was raining then, so he postponed taking them to his place of business until the next morning, and he had them weighed elsewhere on the way there. They had not been fed or watered since before the auction. The second weighing showed a lower weight than respondent's weighing. The only basis for complainant's allegation that they were weighed inaccurately by respondent is the difference between the two weights.

The checkweighing on a different scale the next morning when the cattle had not been fed or watered for about 24 hours showed a difference of about 4%.

The evidence in the record is simply not sufficient to establish complainant's contention of inaccuracy in respondent's weighing. If either scale was inaccurate, there is nothing to show that it was respondent's and not the other one.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 USC §§ 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 USC, 1982 Ed., App. pg. 1068.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117

On a complainant's right to judicial review of such an order, see 5 USC §§ 702-3 and *United States v. I.C.C.*, 337 US 426.

The complaint herein is hereby dismissed.

Copies of this Order shall be served on the parties.

CROCKETT LIVESTOCK SALES CO., INC. v. RECTOR AUCTION SALE BARN, INC.
P&S Docket No. 6698.
Decision and Order issued June 10, 1988.

Market agency - Failure to transmit proceeds of sale to principal.

J. Thomas Caldwell, Ripley, Tennessee, for Complainant.
Gus Camp, Piggott, Arkansas, for Respondent.
John J. Casey, Presiding Officer.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, begun by a complaint received on November 27, 1985, alleging in substance that defendant removed certain cattle from complainant's place of business under a promise to be responsible for payment for them, sold them and retained the proceeds, and that the cattle were unpaid for. The amount claimed was $2,571.35.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding under the Rules of Practice, were served on respondent on March 17, 1986. A copy of the investigation report was served on complainant on the same day. Respondent filed an answer and request for oral hearing, which was served on complainant, which raised no issue of timeliness.

An oral hearing was held on October 21, 1986 in Caruthersville, Missouri, before John J. Casey of the Office of the General Counsel of this Department. Complainant was represented by Mr. J. Thomas Caldwell, Attorney, of Ripley, Tennessee. Respondent was represented by Mr. Gus Camp, Attorney, of Piggott, Arkansas. Six witnesses testified. Eight exhibits were received. No brief was received.

Findings of Fact

1. Complainant Crockett Livestock Sales Co., Inc., a corporation, at all times material herein was engaged in business as a market agency selling on commission, and as a dealer buying and selling for its own account, livestock in commerce, operating on Crockett County Sales Co., Inc., Maury City, Tennessee, a posted stockyard subject to the Act, and so registered with the Secretary under the Act.

2. Respondent Rector Auction Sale Barn, Inc., a corporation, at all times material herein was engaged in business as a market agency selling on commission, and as a dealer buying and selling for its own account, livestock in commerce, operating on a posted stockyard of the same name subject to the Act, at Rector, Arkansas, and so registered with the Secretary under the Act.

3. On or about August 28, 1985, respondent's president Doyne Simpson, with permission of complainant through agents, removed certain livestock from the place of business of complainant, which had been purchased that day by one Tommy Horner, not a party herein, for a total of $2,571.35.

4. A few days thereafter, respondent, with full knowledge that such livestock were unpaid for, sold them and retained the proceeds on account of a pre-existing debt of Mr. Horner.

5. The complaint was received within 90 days of accrual of the cause of action alleged therein.

Conclusions

The following is undisputed. On August 28, 1985, one Tommy Horner was indebted to both complainant and respondent on account of earlier transactions. Mr. Horner had been a dealer, but was not then bonded as required for a dealer, and complainant's agents knew this. Mr. Horner bought certain cattle at complainant's auction for a total of $2,571.35 on the understanding that they would not be released until further arrangements were made about payment. Respondent's president Doyne Simpson, with permission of complainant's agents, removed them in his truck. He hauled them to respondent's place of business. A few days later, respondent sold them for Mr. Horner's account and retained the proceeds on account of Mr. Horner's pre-existing debt to respondent.

Complainant contended that Mr. Simpson, before he removed the cattle from complainant's place of business, promised complainant's agents that he would be fully responsible for payment for them. Witnesses for complainant testified to this. Respondent denied this, and Mr. Simpson testified that he did not make any such promise, but to the contrary stated that he would not be responsible for any debt of Mr. Horner.

We conclude that Mr. Simpson made such a promise. He had an incentive to make such a promise, to obtain the cattle. Complainant's agents had no incentive to release them without such a promise. Also, under the circumstances detailed above, a conclusion that complainant's agents would have released the cattle, to Mr. Simpson or anyone else, without either payment or arrangement for payment for them, merely trusting Mr. Horner to pay for them when he was indebted to complainant and not bonded, is simply not credible.

On the basis of the evidence explained above, we conclude that respondent's sale of the cattle for Mr. Horner's account and retention of the proceeds was done with full knowledge that they were unpaid for. Such action by a market agency has been held many times to be a violation of the Act. For example, see *Rice v. Wilcox*, 34 Ag.Dec. 1651, 35 Ag.Dec. 212, *aff'd.*, 630 F.2d 586, 39 Ag.Dec. 883 (8 Cir. 1980). In the absence of information as to the amount of the proceeds, we conclude that respondent should pay complainant the price at which the cattle were purchased at complainant's auction by Mr. Horner.

> Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.

Eastman Co. v. Southern Photo Co., 273 U.S. 359, 379.

Respondent, apparently as an offset, contended that Mr. Horner had previously bought certain cattle at its auction, had never paid for them, and had sold them at complainant's auction, that complainant had issued certain checks for the proceeds, payable to Mr. Simpson, and that Mr. Simpson's endorsement on them had been forged. The evidence is not sufficient to establish liability of complainant to respondent on that transaction. The evidence in support of the offset consisted of copies of those checks, Mr. Simpson's testimony that he saw the cattle sold at complainant's auction and that the endorsements on the checks were forgeries, plus certain hearsay of Mr. Horner. There was no evidence that complainant retained the proceeds, or that complainant and not Mr. Horner or someone else forged the

[illegible] on the checks and obtained the proceeds thereof.

On the jurisdiction to issue a reparation order on the basis of a single transaction, see *Rice, supra.*

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 USC § § 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 USC, 1982 Ed., App. pg. 1068. It constitutes "an order for the payment of money" within the meaning of Section 309(f) of the Act, 7 USC § 210(f), which provides for enforcement of such an order by court action begun by a complainant.

It is requested that copies of all pleadings filed by any party to any such action be filed with the Hearing Clerk, USDA, Washington, DC 20250, for inclusion in the file on this reparation proceeding. It is further requested that, if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such action, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, DC 20250-1400.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a respondent's right to judicial review of such an order, see *Maly Livestock Commission v. Hardin et al.*, 446 F.2d 4, 30 Ag.Dec. 1063 (8 Cir. 1971).

Order

Within 30 days of the date of this order, respondent Rector Auction Sale Barn, Inc. shall pay to complainant Crockett Livestock Sales Co., Inc. $2,571.35, together with interest thereon at the rate of 13% per annum from October 1, 1985 until paid.

JIMMY RAY HALEY v. RONNYE RICHARDS d/b/a RONNYE RICHARDS LIVESTOCK CO.
P&S Docket No. R-88-1.
Dismissal Order issued June 8, 1988.

Complainant, pro se.
Respondent, pro se.
Dismissal Order issued by Donald A. Campbell, Judicial Officer.

DISMISSAL ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*). A timely complaint was filed in which complainant sought reparation against respondent in the amount of $515.07 in connection with the sale of cows.

A copy of the formal complaint was served on respondent who filed an answer denying any liability to complainant. However, on May 23, 1988, respondent died. As the jurisdiction to issue reparation orders does not extend to a decedent's personal representative, the complaint filed against the respondent must be dismissed. *Steven P. Russell II v. R.L. Schmidt, DVM*, 41 Agric. Dec. 1571 (1982).

Therefore, the complaint is hereby dismissed with prejudice.

Copies of this order shall be served upon the parties.

RANCH 77 v. MODESTO MENDICOA.
P&S Docket No. 6770.
Default Order issued June 16, 1988.

Complainant, pro se.
Respondent, pro se.
Order issued by Donald A. Campbell, Judicial Officer.

DEFAULT ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, begun by a complaint received on February 3, 1986, alleging in substance purchasing of livestock on a weight basis but causing the scale to show false weights. The amount claimed was $1,107.90.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding under the Rules of Practice, were served on respondent on September 24, 1986. A copy of the investigation report was served on complainant on June 24.

At the time of service of the copies of the complaint and investigation report, respondent was notified that an answer thereto should be filed within 20 days after such service, and that failure to file an answer would be deemed an admission of the allegations contained in the complaint, and that the case file would be forwarded to the Office of the Secretary for the issuance of a default order without oral hearing, as provided in the Rules of Practice at 9 CFR § 202.106(d). No answer was received from respondent.

The failure of respondent to file such an answer within the specified time limit is deemed to be an admission of all the allegations of the complaint and a consent to the issuance of a final order in the proceeding, based on all evidence in the record, including information contained in the investigation report.

On the basis of the record as thus formed, it is found that respondent, while engaged in business as a dealer buying and selling livestock in commerce for his own account, with a place of business at Manila, Utah, and so registered with the Secretary under the Act, on December 31, 1985, boug' from complainant 56 steers at 67¢ per pound, weighed in 15 drafts, and heifers at 57¢ per pound, weighed in six drafts, weighed on a scale Grantsville, Utah, and, by use of a magnet on a counterweight of the sca.. caused the scale to show each draft as weighing 50 pounds less than it accurate weight.

Multiplying 15 X 50 X .67 produces $502.50. Multiplying 6 X 50 X .5' produces $171.00. Those two figures total $673.50.

Complainant claimed additional items of damages. Complainant did n' cite any authority for awarding reparation for such additional items, and v do not know any.

On the jurisdiction to issue a reparation order on the basis of a singl transaction, see *Hays Livestk. Com'n Co., Inc. v. Maly Livestk. Com'n. Co., Inc.*, 498 F.2d 925, 33 Ag.Dec. 1122 (10 Cir. 1974); *Rice v. Wilcox*, 630 F.2d 586, 39 Ag.Dec. 883 (8 Cir. 1980); *Rowse v. Platte Valley Livestock, Inc.*, 597 F.Supp. 1055, 604 F.Supp. 1463 (D. Nebr. 1985); *Neugebauer v. Ryken*, Civ. 74-4018, U.S.D.C., D.S.Dak., So.Div, 1975, 34 Ag.Dec. 1712; and *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W.2d 229, 41 Ag.Dec. 48 (1982).

Reparation orders issued against dealers under the Act have been enforced in *Rice v. Wilcox*, 630 F.2d 586, 39 Ag.Dec. 883 (8 Cir. 1980); and *Thomas E. Lane et al. v. Gail F. Sohler etc.*, 42 Ag.Dec. 1072 (U.S.D.C., D. Montana, 1983).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2 35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 USC § § 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 USC, 1982 Ed., App. pg. 1068. It constitutes "an order for the payment of money" within the meaning of Section 309(f) of the Act, 7 USC § 210(f), which provides for enforcement of such an order by court action begun by a complainant.

It is requested that copies of all pleadings filed by any party to any such action be filed with the Hearing Clerk, USDA, Washington, DC 20250, for inclusion in the file on this reparation proceeding. It is further requested that, if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such action, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, DC 20250-1400.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR §202.117.

On a respondent's right to judicial review of such an order, see *Maly Livestock Commission v. Hardin et al.*, 446 F.2d 4, 30 Ag.Dec. 1063 (8 Cir. 1971); and *Fort Scott Sale Co., Inc. v. Hardy*, 570 F.Supp. 1144, 42 Ag.Dec. 1079 (D.Kan, 1983).

Order

Within 30 days of the date of this order, respondent Modesto Mendicoa shall pay to complainant Ranch 77 $673.50, together with interest thereon at the rate of 13% per annum from February 1, 1986 until paid.

Copies of this Order shall be served on the parties.

In re: DEWEY H. BOYD, d/b/a DIXIE PRODUCE SALES.
PACA Docket No. D-88-531.
Order filed June 24, 1988.

Allan Kahan, for Complainant.
Respondent, pro se.
Order Issued by Victor W. Palmer, Chief Administrative Law Judge.

ORDER OF DISMISSAL

For good cause shown, the above-captioned matter is hereby dismissed. Copies hereof shall be served upon the parties.

In re: WILLIAM L. BROWN d/b/a BARBER SALES.
PACA Docket No. D-88-504.
Ruling filed June 20, 1988.

Edward Silverstein, for Complainant.
Richard L. Katz, Coral Gables, Florida, for Respondent.
Ruling Issued by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

On June 6, 1988, Chief Administrative Law Judge Victor W. Palmer certified to the Judicial Officer the question as to whether an order may be entered revoking a license under the Perishable Agricultural Commodities Act, with the consent of the respondent, without making findings that the respondent has committed repeated or flagrant violations of the Act. For the reasons stated in complainant's brief filed June 15, 1988, I agree that the statute does not authorize revocation of a license without making findings as to repeated or flagrant violations. 7 U.S.C. § 499h(a).

In re: DAVIS DISTRIBUTORS, INC.
PACA Docket No. 2-7661.
Decision and Order filed May 3, 1988.

Failure to make full payment promptly - Bankruptcy

Andrew Y Stanton, for Complainant
Alan Rosenblum, Alexandria, Virginia, for Respondent.
Decision and Order issued by Edwin S Bernstein, Administrative Law Judge

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on September 10, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1986 through May 1987 (based on the transactions denoted in paragraph 5 of the complaint, rather than the description of such [illegible] through January 1987), respondent

purchased, received, and accepted, in interstate and foreign commerce, from 16 sellers, 185 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $451,332.43.

A copy of the complaint was served upon respondent which filed an answer, denying the allegations of the complaint except that it admitted having filed for bankruptcy on June 4, 1987. Complainant has filed a motion for judgment on the pleadings based on admissions contained in respondent's bankruptcy petition. Complainant's motion is granted and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, the oral hearing set for May 17, 1988, is hereby cancelled.

Findings of Fact

1. Respondent, Davis Distributors, Inc., is a corporation whose address is P.O. Box 22822, Arlington, Virginia.

2. Pursuant to the licensing provisions of the Act, license number 830067 was issued to respondent on October 15, 1982. This license was renewed annually, and is presently in effect.

3. On June 4, 1987, respondent filed in the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division, a voluntary petition under Chapter 11 of the Bankruptcy Code. In such petition, it listed as unsecured creditors 10 of the 16 sellers set forth in paragraph 5 of the complaint. Respondent admitted owing these 10 sellers $502,643.00, of which $420,888.00 are part of the failures to make full payment promptly alleged in paragraph 5 of the complaint.

4. As more fully set forth in paragraph 5 of the complaint, during the period February 1986 through May 1987, respondent purchased, received, and accepted in interstate and foreign commerce, from the 10 sellers referred to in Finding of Fact 3 above, 167 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $420,888.00.

Conclusions

Respondent's failure to make full payment promptly with respect to the 167 transactions set forth in Finding of Fact No. 4, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the order below is issued.

Order

The license of respondent Davis Distributors, Inc., is hereby revoked.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final June 14, 1988.-Editor]

In re: VINCENT D. MAENZA d/b/a VINCENT D. MAENZA BANANA CO., d/b/a MAENZA & SONS.
PACA Docket No. D-88-513.
Decision and Order filed April 21, 1988.

Failure to make full payment promptly - Failure to file answer.

Andrew Y. Stanton, for Complainant.
Respondent, pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on January 5, 1988, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period September 1985 through February 1987, respondent purchased, received, and accepted, in interstate and foreign commerce, from 44 sellers, 177 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $280,404.93. It is also alleged that, by failing to make full payment promptly, respondent failed to maintain sufficient assets in trust.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Vincent D. Maenza d/b/a Vincent D. Maenza Banana Co., d/b/a Maenza & Sons, is an individual whose address is P.O. Box 207, Westwego, Louisiana 70094.

2. Pursuant to the licensing provisions of the Act, license number 179224 was issued to respondent on February 10, 1959. This license was renewed annually, but terminated on February 10, 1987, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period September 1985 through February 1987, respondent purchased, received, and accepted in interstate and foreign commerce, from 44 sellers, 177 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $280,404.93.

4. Respondent, by failing to make full payment promptly as set forth in Finding of Fact 3 above, failed to maintain sufficient assets in trust.

Conclusions

Respondent's failure to make full payment promptly with respect to the 44 transactions set forth in Findings of Fact Nos. 3 and 4 above, constitute willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision becomes final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § § 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final June 3, 1988.-Editor]

In re: SIX FLAGS PRODUCE, INC.
PACA Docket No. D-88-519.
Decision and Order filed May 16, 1988.

Failure to make full payment promptly - Admission of material allegations of complaint.

Edward M Silverstein, for Complainant.
John L. Watson, Jr., Jonesboro, Georgia, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on March 10, 1988, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period April 1986 through April 1987, respondent purchased, received and accepted, in interstate and foreign commerce, from six sellers, 28 lots of tomatoes, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $218,979.93.

A copy of the complaint was served upon respondent. The respondent filed an answer to the complaint in which it admitted still owing three of the six shippers named in the complaint a total of $87,979.93 ($87,299), and claimed that its failures to make timely payment "was not occassioned [sic] by a breach of trust nor was it fraudulent but was occassioned [sic] because the cash flow to Respondent has been extremely slow." In view of these admissions, the complainant has moved for the issuance of a decision pursuant to section 1.139 of the Rules of Practice. Under that provision of the Rules of Practice, the complainant is entitled to the issuance of decision when the respondent substantially admits the allegations of the complaint. *Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987). It is clear that the respondent in the instant case has admitted sufficient of the complainant's allegations to warrant a conclusion that it committed repeated and flagrant violations of the Act and that its license ought to be revoked. *Columbus Fruit Company, Inc.*, 40 Agric. Dec. 109 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982). Accordingly, upon the motion of the complainant for the issuance of a decision, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139)

Findings of Fact

1. Respondent, Six Flags Produce, Inc., is a corporation, whose address is Shed 3, Units 15 and 16, Georgia State Farmers Market, Forest Park, Georgia 30051-2176.

2. Pursuant to the licensing provisions of the Act, license number 841370 was issued to respondent on June 5, 1984, was renewed annually, presently is in effect, and is as next subject to renewal on or before June 5, 1988.

3. As more fully set forth in paragraph 5 of the complaint during the period October 1986 through April 1987 respondent purchased, received and accepted in interstate and foreign commerce, from three sellers, 11 lots of tomatoes, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $87,299.00.

Conclusions

Respondent's failure to make full payment promptly with respect to the 11 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Complainant filed a Motion for a Decision on April 18, 1988, to which the Respondent filed "Opposition to Motion for Decision" on May 2, 1988. The premises thereof have been considered; however, there is no legal basis set forth therein which would furnish a basis for denying the Complainant's Motion for a Decision.

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a Respondent's failure to deny the allegations of the complaint constitutes an admission of the allegations in the complaint, not so denied, and a waiver of hearing. *In re: Morgantown Produce, Inc.*, PACA Docket No. 2-7572 (February 22, 1988); *In re: Henson*, 45 Agric. Dec. ___, (Nov. 4, 1986); *In re: Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986).

In view of the Respondent's admissions in its pleadings, the issuance of this decision and order is in accord with the Department's established precedent.

Order

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final June 24, 1988.-Editor]

In re: TRI-CITY WHOLESALE, INC.
PACA Docket No. 2-7663.
Decision and Order filed May 2, 1988.

Failure to make full payment promptly - Admission of material allegations of complaint.

Edward M. Silverstein, for Complainant.
John M. Cunningham, Grand Island, Nebraska, for Respondent.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 10, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August 1985 through November 1986, respondent purchased, received, and accepted, in interstate and foreign commerce, from five sellers, 78 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $217,029.32.

A copy of the complaint was served upon respondent and respondent filed an answer thereto admitting all of the material allegations of the complaint. Therefore, upon the motion of the complainant for the issuance of a Decision, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Tri-City Wholesale, Inc., is a corporation whose mailing address is P.O. Box 1214, Grand Island, Nebraska 68802.

2. Pursuant to the licensing provisions of the Act, license number 740244 was issued to respondent on August 13, 1973. This license was renewed annually, but terminated on August 13, 1987, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period August 1985, through November 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from five sellers, 78 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $217,029.32.

Conclusions

A finding is made that respondent has committed flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § § 1.139 and 1.145).

Copies hereof shall be served upon parties.
[This decision and order became final June 11, 1988.-Editor]

In re: JERRY FREEMAN TUCKER d/b/a TOMATO HOUSE.
PACA Docket No. D-88-532.
Dismissal filed June 30, 1988.

Edward M. Silverstein, for Complainant.
Respondent, pro se.
Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge.

DISMISSAL

Upon complainant's request, the Notice to Show Cause is hereby dismissed.

In re: T.W.I.G. OF MIAMI, INC.
PACA Docket No. D-88-510.
Decision and Order filed April 21, 1988.

Failure to make full payment promptly - Failure to file answer.

Thomas E. Heinz, for Complainant.
Respondent, pro se.
Decision and Order Issued by Edwin S Bernstein, Administrative Law Judge

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on December 3, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May through September, 1986, respondent purchased, received and accepted, in interstate and foreign commerce, from 12 sellers, 38 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $134,067.80.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, T.W.I.G. of Miami, Inc., is a corporation whose address is 1350 N.W. 21st Terrace, Miami, Florida 33142.

2. Pursuant to the licensing provisions of the Act, license number 851778 was issued to respondent on August 12, 1985. This license was terminated o August 12, 1986, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(d) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the

accepted in interstate and foreign commerce, from 12 sellers, 38 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $134,067.80.

Conclusions

Respondent's failure to make full payment promptly with respect to the 38 transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision becomes final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § § 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final June 24, 1988.-Editor]

MARK T. ADAMSON CO., LTD. v. BOGGIATTO PACKING CO., INC.
PACA Docket No. R-88-45.
Order issued June 27, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This was a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

By letter dated April 15, 1988, respondent notified the Department that a check in full settlement of complainant's claim had been tendered to complaint [sic]. Complainant was given an opportunity to dispute the fact that it had been paid in full and did not do so.

Accordingly, the complaint was dismissed.

BIANCHI & SONS PACKING CO. v. VIC MAHNS, INC.
PACA Docket No. 2-7377.
Decision and order issued June 16, 1988.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay to complainant, as reparation, $6,416.10, plus 13 percent interest per annum thereon from November 1, 1985, until paid.

WM. BOLTHOUSE FARMS, INC. v. AGRI-PROCESSORS, LTD.
PACA Docket No. R-88-162.
Order issued June 16, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

Respondent was ordered to pay complainant, as reparation, $4,050.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

J. R. BROOKS & SON INC. v. TROPICAL PRODUCE COMPANY.
PACA Docket No. 2-7172.
and
TROPICAL PRODUCE COMPANY v. SAMONA BENEVIDEZ and VISTA MCALLEN INC. d/b/a WORLDWIDE IMP-EX COMPANY.
PACA Docket No. 2-7374.
Decision and order issued June 9, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondents Samona Benevidez and Vista McAllen Inc., doing business as Worldwide Imp-Ex Company, were ordered to pay to Tropical Produce Company, as reparation, $2,433.28, plus 13 percent interest per annum thereon from August 1, 1985, until paid.

Within 30 days of receipt of payment from Worldwide, Tropical was ordered to pay to J. R. Brooks & Son, Inc., the money it received from Worldwide, plus 13 percent interest per annum thereon from the first day of the month after the date of receipt from Worldwide, until paid.

COX TOMATO COMPANY, INC. v. SIDNEY M. WOLFE d/b/a WILDEROM TOMATO HOUSE.
PACA Docket No. 2-7319.
Decision and order issued June 9, 1988.

Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay complainant $5,675.80, as reparation, plus 13 percent interest per annum thereon from January 1, 1986, until paid.

RICHARD L. DENBO d/b/a RICH DENBO MARKETING v. MIKE SHAPIRO FROZEN FOODS, INC.
PACA Docket No. R-88-70.
Order issued June 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This was a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

During the course of subsequent proceedings, the respondent alleged that it had paid complainant all that was due for these transactions. The presiding officer notified complainant of this allegation, and required the complainant to show cause why its complaint should not be dismissed because respondent was no longer indebted to him. The complainant did not respond to this notice.

Accordingly, the complaint was dismissed.

ELMORE & STAHL, INC. v. RUSSO FARMS, INC.
PACA Docket No. 2-7372.
Order issued June 16, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay complainant, as reparation, $7,190.92, plus 13 percent interest per annum thereon from January 1, 1986, until paid.

FAR SOUTH, INC. d/b/a QUALITY PRODUCE CO. and B. L. HOLLOWAY v. HE-BO FARMS, INC.
PACA Docket No. 2-7042.
Order issued June 13, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Complainant was ordered to pay respondent, as reparation, $13,352.84, plus 13 percent interest per annum thereon from July 1, 1984, until paid.

GARDEN STATE FARMS, INC. v. GRIFFIN & BRAND SALES AGENCY, INC., ELLIS FLEISHER PRODUCE COMPANY, and WILLIAM P. FRANZOY d/b/a BILLY THE KID PRODUCE.
PACA Docket No. 2-7383.
Order issued June 17, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondents William P. Franzoy and Griffin & Brand Sales Agency, Inc., were ordered to pay to complainant Garden State Farms, Inc., as reparation, $9,315.00 plus 13 percent interest per annum thereon from August 1, 1985, until paid.

The complaint was dismissed as to respondent Ellis Fleisher Produce Company.

JOE A. GARZA, ROBERT PEREZ, and ELI PEREZ v. HOWARD GEARING, RAMON R. RAMOS, and SEGUNDO SAN MIGUEL d/b AMERICAN VEGETABLE CO.
PACA Docket No. 2-7626.
Order issued June 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer

ORDER ON RECONSIDERATION
(Summarized)

Respondents' petition to reopen is denied.

The Decision and Order issued February 24, 1988, shall become effecti 30 days from the date of this Order.

Copies of this Order shall be served on the parties.

G&H SALES CO. v. CRANE POTATO CHIP CO., a/t/a ILLINOIS SHACK FOODS, INC.
PACA Docket No. R-88-140.
Order issued June 8, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This was a reparation proceeding under the Perishable Agricultura Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

By letter dated May 6, 1988, respondent notified the Department that settlement had been reached between the parties. Respondent included with its letter a release, signed by complainant's president, indicating that the amount currently owed to complainant was $58,534.32, and that complainant was releasing respondent from such obligation for the consideration of $32,030.15. Insofar as settlement between the parties had been reached, it was appropriate to dismiss the complaint.

Accordingly, the complaint was dismissed.

GENERAL POTATO & ONION, INC. v. POST & TABACK, INC. and/or MISTY MOUNTAIN TRADING CO.
PACA Docket No. 2-7197.
Order issued June 9, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint with regard to each respondent is dismissed.

Copies of this order shall be served upon the parties.

BART A. LAMANUZZI, PAT R. LAMANUZZI, FRANK P. PANTALEO, and VITO N. PANTALEO, d/b/a LAMANUZZI & PANTALEO, LTD. v. M. PAGANO & SONS, INC.
PACA Docket No. 2-7317.
Order issued June 10, 1988.

Order issued by Donald A. Campbell, Judicial Officer

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay complainant $68.13, as reparation, plus 13 percent interest per annum thereon from November 1, 1985, until paid.

TOM LANGE COMPANY, INC. v. MIMS PRODUCE, INC.
PACA Docket No. 2-7305.
Order issued June 10, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay complainant, as reparation, $1,162.50 plus 13 percent interest per annum thereon from August 1, 1985, until paid.

TOM LANGE COMPANY, INC. v. BOBBY G. LEDFORD d/b/a FRESCO PRODUCE CO.
PACA Docket No. R-88-114.
Order issued June 9, 1988.

Order issued by Donald A. Campbell, Judicial Officer

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $35,684.75 in connection with 48 shipments of mixed produce in interstate and foreign commerce. Of this amount, complainant admits that respondent has paid it $15,358.50. Of the $20,326.25 remaining, $1,844.50 represents an indebtedness arising from the sale of produce in intrastate, and not interstate or foreign commerce. The Secretary, therefore, does not have jurisdiction over that transaction. Furthermore, the causes of action as to $2,123.80 arose more than nine months before the filing of the complaint, and the Secretary lacks jurisdiction over that amount too. This leaves $16,357.95 as the balance alleged owed in the complaint for which the Secretary has jurisdiction. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint. Respondent, also, admitted being indebted to complainant in the amount of $19,208.75. However, as noted above, the Secretary has jurisdiction as to only $16,357.85 of this amount. Accordingly, the issuance of an order without further procedure in this amount is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R.

§ 47.8(d)).

Complainant, Tom Lange Company, Inc., is a corporation whose address is 3100 Produce Row, Room 2B, Houston, Texas 77023. Respondent, Bobby G. Ledford, is an individual doing business as Fresco Produce Company whose address is 3121½ Produce Row, Houston, Texas 77023. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint, as modified above, are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. § 499b) and have resulted in damages to complainant of $16,357.95. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $16,357.95 with interest thereon at the rate of 13 percent per annum from March 1, 1987, until paid.

Copies of this order shall be served upon the parties.

A. LEVY & J. ZENTNER CO. v. GARDEN STATE FARMS, INC.
PACA Docket No. 2-7310.
Order issued June 9, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint is dismissed.

Copies of this order shall be served upon the parties.

LINDEMANN FARMS, INC. v. CHIQUITA BRANDS, INC.
PACA Docket No. 2-7382.
Order issued June 17, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent Chiquita Brands, Inc. was ordered to pay to complainant Lindemann Farms, Inc., the sum of $4,747.50 plus 13 percent interest per annum thereon from November 1, 1985, until paid.

The counterclaim was dismissed.

JOHN LIVACICH PRODUCE, INC. d/b/a VISTA AVOCADO v. McDONNELL & BLANKFORD, INC.
PACA Docket No. 2-7327.
Order issued June 10, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay complainant, as reparation, $3,510.00 plus 13 percent interest per annum thereon from October 1, 1985, until paid. The counterclaim was dismissed.

JOHN LIVACICH and GENE OSWALT d/b/a RANCHO SALES CO.
PACA Docket No. 2-7248.
Order issued June 16, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent McDonnell & Blankfard, Inc., was ordered to pay to John Livacich & Gene Oswalt d/b/a Rancho Sales Co., as reparation, $1,939.83 plus 13 percent interest per annum thereon from April 1, 1986, until paid.

PACIFIC GAMBLE ROBINSON CO. a/t/a PACIFIC FRUIT & PRODUCE CO. v. ROBERT W. CASTO, d/b/a PRIMA CITRUS & FRUIT EXCHANGE a/t/a PRIMA TRADING COMPANY.
PACA Docket No. 2-7215.
Order issued June 28, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay complainant, as reparation, $6,186.50, plus 13 percent interest per annum thereon from December 1, 1985, until paid.

THOMAS B. SCOTT, SR., d/b/a SCOTT & SONS QUALITY PRODUCE v. MIDWEST MARKETING CO.
PACA Docket No. 2-7318.
Order Issued June 10, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint was dismissed.
The counterclaim was dismissed.

SUNRICH, INCORPORATED v. PALAZOLA PRODUCE CO., INC.
PACA Docket No. 2-7297.
Order issued June 16, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on May 9, 1988, requiring respondent to pay reparation, in the amount of $1,940.00 plus interest, to complainant. On May 24, 1988, the respondent filed a "Petition to Rehear, Reargue and Reconsider and/or Reopen."

Respondent's petition raises no contentions or issues which were not raised and fully considered in our order of May 9, 1988. In our opinion, the May 9, 1988, Decision and Order is supported by the evidence and the law applicable thereto. Moreover, as the final order in this case has been issued, we cannot entertain respondent's petition to reopen the record. *See* 7 C.F.R. § 47.24(b). Accordingly, respondent's "Petition to Rehear, Reargue and Reconsider and/or Reopen" is denied without prior service upon complainant.

The Order of May 9, 1988, is reinstated except that respondent has 30 days from the date of this Order in which to pay complainant the reparation awarded therein.

Copies of this order shall be served upon the parties.

SUNRISE PRODUCE, INC. v. THE CASTELLINI COMPANY.
PACA Docket No. 2-7024.
Order Issued June 13, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent The Castellini Company, was ordered to pay Sunrise Produce, as reparation, $12,672.50, plus 13 percent interest per annum thereon from April 1, 1985, until paid.

TOMATOES, INC. v. SOL SALINS, INC.
PACA Docket No. 2-7243.
Order issued June 13, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent Sol Salins, Inc., was ordered to pay to Tomatoes, Inc., as reparation, $803.50, plus 13 percent interest per annum thereon from September 1, 1985, until paid.

TRI PRODUCE CO. v. SANTISI PRODUCE CO.
PACA Docket No. 2-7321.
Order issued June 10, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint is dismissed.

Copies of this order shall be served upon the parties.

WHIZPAC, INC. v. CHARLES BAILOR and EMANUEL BRAUNSTEIN d/b/a POWER PRODUCE CO.
PACA Docket No. 2-7312.
Order issued June 13, 1988.

Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay complainant $2,240.00, as reparatior 13 percent interest per annum thereon from January 1, 1985, until paid.

THE WOODS COMPANY INCORPORATED v. RICHARD E. BOYD d/b/a DEARDORFF PRODUCE CO.
PACA Docket No. 2-7370.
Order issued June 9, 1988.

Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Respondent was ordered to pay complainant $2,574.00, as reparation, plus 13 percent interest per annum thereon from January 1, 1986, until paid.

The counterclaim of respondent was dismissed.

JAMES S. AGAR AND MARK R. SEITZ d/b/a RANCHO VISTA FARMS v. CALIFORNIA SPROUTS AND CELERY CO.
PACA Docket No. RD-88-281.
Default Order Issued June 27, 1988.

Respondent was ordered to pay complainant, as reparation, $29,26.36, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

ALBEE TOMATO CO. INC. v. KOREAN PRODUCE CORPORATION.
PACA Docket No. RD-88-290.
Default Order Issued June 29, 1988.

Respondent was ordered to pay complainant, as reparation, $742.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

BONITA VALLEY APPLE CO., INC. v. HANSEN FOODS, INC.
PACA Docket No. RD-87-372.
Ruling and Order Issued June 17, 1988.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT, VACATING STAY ORDER, REINSTATING DEFAULT ORDER

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the respondent failed to file a timely answer. A default order was issued on August 3, 1987, awarding reparation to complainant in the amount of $8,858.19, plus interest, for the purchase of apples by respondent. In an August 25, 1987, letter, respondent moved that the default order be reconsidered. The motion was denied in a September 18, 1987, order, which also stayed this proceeding to provide respondent with 10 days from the date of this order to file a motion to reopen after default and submit a good reason why it failed to file a timely answer. Respondent moved for reconsideration of this order, but its motion was denied in an order dated October 26, 1987. The default order was further stayed. Respondent filed a motion to reopen and included reasons for its failure to file a timely answer.

Respondent claims that it believed the debt had been satisfied by its payment of $50.00 per ton. However, the formal complaint alleges that the $50.00 per ton payment was only partial, as the contract price was for $60.00 per ton. It was, therefore, unreasonable for respondent to assume that complainant was satisfied with a payment of $50.00 per ton, and that an answer would thus not be required. Respondent also cites its lack of experience with the Department, however, respondent was told explicitly that an answer was required and what the answer should contain, in an April 10, 1987, letter received by respondent on May 6, 1987. Respondent alleges a turnover in its staff prevented it from gathering information needed to file the answer. However, staff turnover is an insufficient excuse for failing to abide by filing deadlines, especially since respondent made no effort to request

an extension of time to file an answer. Further, respondent raised no objection when it was served with the complaint and notified on July 17, 1987, that the matter was in default. Only after respondent was served with the default order on August 11, 1987, did it express any desire to respond to the complaint. Finally, respondent argues that it has a good defense, which it should be permitted to assert. Even if this argument is true, it does not warrant reopening the default in view of respondent's utter failure to show a good reason why an answer was not filed on time. The motion to reopen is thus denied.

The September 16, 1987, and October 26, 1987, stay orders are hereby vacated, and the August 3, 1987, default order is reinstated, with the amount awarded therein, including interest, to be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

BUSHMANS' INC. v. NORTH CENTRAL CORPORATION.
PACA Docket No. RD-88-277.
Default Order Issued June 24, 1988.

Respondent was ordered to pay complainant, as reparation, $3,845.20, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

C & G ONION CO. INC. v. GARY WATKINS PRODUCE CO. INC.
PACA Docket No. RD-88-302.
Default Order Issued June 30, 1988.

Respondent was ordered to pay complainant, as reparation, $2,670.00, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

CAL-MEX DISTRIBUTORS, INC. v. MITSUGU TANITA d/b/a MITS TANITA SALES.
PACA Docket No. RD-88-280.
Default Order Issued June 27, 1988.

Respondent was ordered to pay complainant, as reparation, $2,142.90, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

CAROL-ANN PRODUCE PACKAGING CORP. v. WAYCO CORP. a/t/a AMERITEX PRODUCE.
PACA Docket No. RD-88-292.
Default Order issued June 29, 1988.

Respondent was ordered to pay complainant, as reparation, $9,015.00, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

CASTIGLIONE BROS. v. CAETANO J. RUSSO d/b/a G R PRODUCE CO.
PACA Docket No. RD-88-235.
Default Order issued June 14, 1988.

Respondent was ordered to pay complainant, as reparation, $24,072.20, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

CASTIGLIONE BROS. v. GAETANO J. RUSSO d/b/a G R PRODUCE CO.
PACA Docket No. RD-88-235.
Order issued June 14, 1988.

DENIAL OF MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. § 47.25(e)). Respondent attached a proposed answer to his motion to reopen.

In his motion to reopen, respondent claims that he did answer at the proper time, but his answer must have been misplaced. He also claims that the proposed answer he is submitting is a duplicate copy of the earlier answer. However, the formal complaint was served upon respondent on February 16, 1988, and the answer was therefore due no later than March 7, 1988. Respondent's proposed answer, which is supposedly a duplicate copy of the original, is shown as having been signed by the notary on May 4, 1988, almost two months after the answer was due. This contradicts respondent's assertion that the answer was timely submitted, but misplaced. It is thus concluded that respondent has failed to present a good reason to warrant reopening after default. Respondent's motion is therefore denied. A Default Order is appropriate and will be issued.

Copies of this order shall be served upon the parties.

CHIQUITA BRANDS, INC. v. CENTRAL NEW YORK PRODUCE, INC.
PACA Docket No. RD-88-219.
Order Issued June 14, 1988.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on April 25, 1988, against respondent in the amount of $4,469.00 plus interest. However, after the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. § 47.25(e)).

In its motion, respondent says that it did not file a timely answer because its principal employee, Joseph Russo, picked up the mail at the location of the business only occasionally, because of Mr. Russo's illness, which led to the business being forced to close. However, respondent should have ensured that someone else pick up the mail if Mr. Russo was unable to do so. It is our conclusion that respondent has failed to provide a "good reason" for reopening after default, as is required by section 47.25(e) of the Department's regulations (7 C.F.R. § 47.25(e)). Respondent's motion is hereby denied.

The reparation awarded in the April 25, 1988, order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

CLONTS FARMS INC. v. VIC MAHNS INC.
PACA Docket No. RD-88-291.
Default Order Issued June 29, 1988.

Respondent was ordered to pay complainant, as reparation, $7,053.00, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

DE ANZA PRODUCE COMPANY INC. v. INTERNATIONAL PRODUCE (USA) INC.
PACA Docket No. RD-88-294.
Default Order Issued June 29, 1988.

Respondent was ordered to pay complainant, as reparation, $1,890.50, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

DEBRUYN PRODUCE CO. v. ZELLWOOD FARMERS MARKET INC.
PACA Docket No. RD-88-299.
Default Order issued June 30, 1988.

Respondent was ordered to pay complainant, as reparation, $1,936.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

DEBRUYN PRODUCE CO. v. CHAPMAN PRODUCE CO., INC.
PACA Docket No. RD-88-264.
Order issued June 23, 1988.

ORDER OF DISMISSAL
(Summarized)

This was a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

A copy of the formal complaint was served on respondent. By letter dated May 17, 1988, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim.

Accordingly, the complaint was dismissed.

FIVE BROTHERS PRODUCE INC. v. T & L DISTRIBUTORS INC.
PACA Docket No. RD-88-301.
Default Order issued June 30, 1988.

Respondent was ordered to pay complainant, as reparation, $2,717.10, plus 13 percent interest per annum thereon from March 1, 1987, until paid.

FLORIDA GOLD PRODUCE FARMS INC. v. INTERNATIONAL PRODUCE INC. a/t/a INTERNATIONAL POTATO INC.
PACA Docket No. RD-88-288.
Default Order issued June 28, 1988.

Respondent was ordered to pay complainant, as reparation, $13,680.00, plus 13 percent interest per annum thereon from February 1, 1987, until paid.

FRESHCO INCORPORATED v. ZELLWOOD FARMERS MARKET INC.
PACA Docket No. RD-88-286.
Default Order issued June 28, 1988.

Respondent was ordered to pay complainant, as reparation, $22,494.55, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

GENBROKER CORPORATION a/t/a GENERAL BROKERAGE CO. v. SIX FLAGS PRODUCE INC.
PACA Docket No. RD-88-284.
Default Order issued June 27, 1988.

Respondent was ordered to pay complainant, as reparation, $3,604.80, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

GRIFFIN & BRAND OF MCALLEN INC. v. LOUIS DESPAUZ AND CARL G. PORCHE, JR. d/b/a LUCKY US.
PACA Docket No. RD-88-289.
Default Order issued June 28, 1988.

Respondent was ordered to pay complainant, as reparation, $5,737.00, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

GRIFFIN & BRAND OF MCALLEN INC. v. GARY WATKINS PRODUCE CO. INC.
PACA Docket No. RD-88-293.
Default Order issued June 29, 1988.

Respondent was ordered to pay complainant, as reparation, $3,870.10, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

GRIFFIN & BRAND SALES AGENCY INC. v. GARY WATKINS PRODUCE CO. INC.
PACA Docket No. RD-88-275.
Default Order issued June 24, 1988.

Respondent was ordered to pay complainant, as reparation, $2,332 50, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

HALL & COLE PRODUCE INC. v. MICHAEL W. UPTON d/b/a 24 CARROT FRUIT & PRODUCE.
PACA Docket No. RD-88-273.
Default Order issued June 23, 1988.

Respondent was ordered to pay complainant, as reparation, $2,071.00, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

CHARLEY HAYASHIDA FARMS INC. v. RICHARD CALLEJA d/b/a ORIENT PRODUCE & FOOD CO.
PACA Docket No. RD-88-271.
Default Order issued June 23, 1988.

Respondent was ordered to pay complainant, as reparation, $2,545.50, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

HERITAGE PRODUCE SALES INC. v. SELECT PRODUCE INC.
PACA Docket No. RD-87-287.
Default Order issued June 28, 1988.

Respondent was ordered to pay complainant, as reparation, $104,901.35, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

JERSEY COAST PRODUCE CO. INC. v. S AND J FOOD PRODUCTS COMPANY INC.
PACA Docket No. RD-88-278.
Default Order issued June 24, 1988.

Respondent was ordered to pay complainant, as reparation, $34,664.65, plus 13 percent interest per annum thereon from October 1, 1986.

JOSEPH KALLISH d/b/a I. KALLISH AND SONS v. STERLING PRODUCE ASSOCIATION.
PACA Docket No. RD-88-300.
Default Order issued June 30, 1988.

Respondent was ordered to pay complainant, as reparation, $1,190.00, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

LANING BROTHERS FARMS INC. v. T & S PRODUCE INC.
PACA Docket No. RD-88-296.
Default Order issued June 29, 1988.

Respondent was ordered to pay complainant, as reparation, $30,741.58, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

M & C PRODUCE CO. INC. v. F. BOGON COMPANY.
PACA Docket No. RD-88-272.
Default Order issued June 23, 1988.

Respondent was ordered to pay complainant, as reparation, $14,140.50, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

MARTIN PRODUCE CO. INC. v. THE TOLEDO GARDENERS COOPERATIVE ASSOCIATION.
PACA Docket No. RD-88-297.
Default Order issued June 29, 1988.

Respondent was ordered to pay complainant, as reparation, $1,900.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

MEYERS PRODUCE INC. v. SAYLOR'S PRODUCE, INC.
PACA Docket No. RD-88-104.
Order issued June 17, 1988.

ORDER OF DISMISSAL
(Summarized)

This was a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

On January 11, 1988, the Department received a copy of a check from respondent to complainant for $22,542.50. In a letter dated January 13, 1988, the Department informed complainant that, because of respondent's apparent payment of almost all of the amount claimed by complainant, it was assumed that complainant wished to have its complaint dismissed. Complainant was given ten days from its receipt of such letter to inform the Department that it wished to maintain its complaint for the amount of its claim that remained unpaid. Complainant was advised that its failure to respond within the ten day period would result in the dismissal of the complaint. Complainant failed to respond to the Department's January 13, 1988, letter.

Accordingly, the complaint was dismissed.

MISSION PRODUCE INC. v. SELECT PRODUCE INC.
PACA Docket No. RD-88-304.
Default Order issued June 30, 1988.

Respondent was ordered to pay complainant, as reparation, $968.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

LEWIS J. NOBLES JR. d/b/a NOBLES PACKING CO. v. SANTOS PRODUCE CO. INC.
PACA Docket No. RD-88-279.
Default Order filed June 27, 1988.

Respondent was ordered to pay complainant, as reparation, $11,360.00, plus 13 percent interest per annum thereon from March 1, 1987, until paid.

NORTHAMPTON GROWERS PRODUCE SALES INC. v. JOHNNY E. FAIR d/b/a MRS. FAIR'S FINER FOODS.
PACA Docket No. RD-88-268.
Default Order filed June 14, 1988.

Respondent was ordered to pay complainant, as reparation, $5,770.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

PETERSON BROS. RIVER VALLEY FARMS INC. v. JOHNNY E. FAIR d/b/a MRS. FAIR'S FINER FOODS.
PACA Docket No. RD-88-307.
Default Order filed June 30, 1988.

Respondent was ordered to pay complainant, as reparation, $5,108.75, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

PRATER & PAL'S PRODUCE CO. INC. v. DOYLE R. BENNETT d/b/a SOUTH CENTRAL MARKETING CO.
PACA Docket No. RD-88-295.
Default Order filed June 23, 1988.

Respondent was ordered to pay complainant, as reparation, $9,245.60, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

RANCHERO PACKING CO., INC. v. PAT WOMACK, INC.
PACA Docket No. RD-87-449.
Order Issued June 17, 1988.

ORDER VACATING STAY ORDER
REINSTATING DEFAULT ORDER
(Summarized)

Respondent has failed to submit any reason why its answer was not timely filed, as directed by the stay order. Therefore, the September 8, 1987, stay order is hereby vacated and the August 27, 1987, default order is reinstated, with the amount awarded therein, including interest, to be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

D.R. SMITH AND JAMES R. SMITH d/b/a MIDWEST MARKETING CO. v. JOLIET FRUIT RANCH INC.
PACA Docket No. RD-88-276.
Default Order Issued June 24, 1988.

Respondent was ordered to pay complainant, as reparation, $10,259.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

SOUTH OMAHA FRUIT MARKET INC. v. NEBRASKA FOODSERVICE, INC.
PACA Docket No. RD-88-274.
Default Order Issued June 24, 1988.

Respondent was ordered to pay complainant, as reparation, $1,590.40, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

TANITA INC. v. ZELLWOOD FARMERS MARKET INC.
PACA Docket No. RD-88-298.
Default Order Issued June 29, 1988.

Respondent was ordered to pay complainant, as reparation, $392.40, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

VASQUEZ PRODUCE CORP. v. PAPAZIAN DIST. CO. INC.
PACA Docket No. RD-88-283.
Default Order Issued June 27, 1988.

Respondent was ordered to pay complainant, as reparation $21,600.55, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

WASHBURN POTATO CO. v. L. R. MORRIS PRODUCE EXCHANGE INC.
PACA Docket No. RD-88-306.
Default Order Issued June 30, 1988.

Respondent was ordered to pay complainant, as reparation, $8,031.50, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

WILKINSON-COOPER PRODUCE INC. v. JOE PINTO & SON INC.
PACA Docket No. RD-88-303.
Default Order Issued June 30, 1988.

Respondent was ordered to pay complainant, as reparation, $9,421.75, plus 13 percent interest per annum thereon from July 1, 1986, until paid.

WYSOCKI SALES INC. v. PRODUCE COUNTRY.
PACA Docket No. RD-88-285.
Default Order Issued June 28, 1988.

Respondent was ordered to pay complainant, as reparation, $3,740.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

In re: CONTINENTAL AIRLINES, INC. AND MICHAEL J. SOUSA.
P.Q. Docket No. 319.
Decision and order filed May 3, 1988.

Failure to inspect baggage - Failure to file answer.

Jaru Ruley, for complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge

DECISION AND ORDER AS TO CONTINENTAL AIRLINES, INC.

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, (Act) (7 U.S.C. § § 151-164a and 167) and regulations promulgated thereunder (7 C.F.R. § 318.13 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent had violated the Act and sections 318.13-10 and 318.13-12(a) of the Code of Federal Regulations (7 C.F.R. § § 318.13-10, 318.13-12(a)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on March 30, 1987, by certified mail in conformity with section 1.147(b)(3) of the Rules of Practice (7 C.F.R. § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that respondent had twenty (20) days after receipt of the complaint to file an answer with the Hearing Clerk. Respondent was also informed that failure to file an answer to, or plead specifically to, any allegation in the complaint, would constitute an admission of such allegation. Additionally, respondent was informed that a failure to file an answer within the time allowed therefor would constitute an admission of the allegations in the complaint and a waiver of hearing. More than twenty (20) days have elapsed since respondent was served with the complaint. Respondent has not filed an answer. Accordingly, under the plain provisions of the Rules of Practice, a default decision should be granted in this case This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § § 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

Findings of Fact

1. Continental Airlines, Inc., herein referred to as the respondent, is a corporation having a business mailing address at Terminal Box 11, Honolulu International Airport, Honolulu, Hawaii 96819.

2. On or about November 10, 1986, at Honolulu International Airport, respondent checked four bags, bearing claim tag numbers 153200, 153201, 153202 and 153203 to the continental United States, i.e., Los Angeles, California, on respondent's flight CO 8. Respondent thereby received the four pieces of baggage for shipment to the continental United States in violation of 7 C.F.R. § § 318.13-10 and 318.13-12(a), because the bags had not been inspected and passed, as required.

Conclusions

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final on June 20, 1988.-Editor]

(Not published herein.-Editor)

Animal Quarantine and Related Laws

BOOTH, LEON. A.Q. Docket No. 337. June 6, 1988.

MARLON HILL, d/b/a OAK HILL FARMS. A.Q. Docket No. 327. June 28, 1988.

Animal Welfare Act

HOLDREN, NORMA and HOLDREN, DENNIS. AWA Docket No. 358. June 6, 1988.

NAGHTIN, SR., WALTER EARL. AWA Docket No. 88-8. June 30, 1988.

SHAW, FEEZAL A., d/b/a SOUTH AMERICAN UNLIMITED and AMERICAN SOCIETY for the PREVENTION OF CRUELTY to ANIMALS. AWA Docket No. 430. June 22, 1988.

Federal Meat Inspection Act

ALLIED STEAKS, INC. FMIA Docket No. 100. PPIA Docket No. 15. June 13, 1988.

HAHN BROTHERS, INC. FMIA Docket No. 88-6. June 3, 1988.

Packers and Stockyards Act

BRIGHAM, ROBERT d/b/a WAHOO LIVESTOCK MARKET and also d/b/a BRIGHAM CATTLE COMPANY. P. & S. Docket No. 6833. June 23, 1988.

ERICSON LIVESTOCK MARKET, INC., JAMES D. BRINKMAN, HOWARD W. PITZER, JANE A. BRINKMAN, RONALD E. WILSON d/b/a RONALD WILSON CATTLE COMPANY, D/B LAND and CATTLE COMPANY, INC., WILLIAM "DEAN" BRINKMAN, KATHERINE BRINKMAN, MARLEN LUBER, and JAMES "JIM" S. PATTERSON. P. & S. Docket No. D-88-28. June 8, 1988.

GARFIELD LIVESTOCK, INC. P. & S. Docket No. D-88-35. June 30, 1988.

GLENN, GAIL d/b/a SUNRISE LIVESTOCK. P. & S. Docket No. 6765. June 3, 1988.

HOLIDAY FOOD SERVICES, INC., a corporation, and NAT ROCKER, an individual. P. & S. Docket No. 6488. June 20, 1988.

HURT, W.W. BENNETT. P. & S. Docket No. D-88-72. June 29, 1988.

LINTON LIVESTOCK MARKET, INC., and KELLY L. FISCHER. P. & S Docket No. D-88-7. June 3, 1988.

OMAHA HOG BUYERS, INC., LEE L. FOWLER and ROBERT D. "BUDDY" PLAMBECK. P. & S. Docket No. 6943. June 27, 1988.

PERRY, DONALD and GLENN IVAN PERRY, d/b/a PERRY LIVESTOCK. P. & S. Docket No. D-88-71. June 29, 1988.

PHILIP LIVESTOCK AUCTION MARKET, INC., JEROME ROSETH, LUETTA ROSETH, GARY PETERSON and LONNIE ARNESON. P. & S. Docket No. D-88-47. June 30, 1988.

RENDULIC PACKING COMPANY, FRANK D. RENDULIC, JR., and FREDERICK A. RENDULIC. P. & S. Docket No. D-88-70. June 22, 1988.

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